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REPORT

on

PROTECTION OF PRIVACY IN ONTARIO

ONTARIO LAW REFORM COMMISSION

1968

Department of the Attorney General

The Ontario Law Reform Commission was established by section 1 of The Ontario Law Reform Commission Act, 1964, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., Chairman
Honourable James C. McRuer, LL.D.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

Dr. Richard Gosse, Q.C. is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute and its offices are at Room 470, Parliament Buildings, Toronto, Ontario, Canada.



ONTARIO LAW REFORM COMMISSION

PARLIAMENT BUILDINGS
TORONTO 2

To: The Honourable A. A. Wishart, Q.C.,
Minister of Justice and
Attorney General for Ontario.

Dear Mr. Attorney:

Pursuant to the provisions of section 2 (1) (a) of The Ontario Law Reform Commission Act, 1964, the Commission initiated a preliminary study to determine the nature of the existing and growing problems in the area referred to compendiously as the "right to privacy" and the extent to which the solution to those problems might fall within the legislative competence of the provincial legislature. The Commission now submits its Report.

For some time the Commission has been giving thought to and compiling data on the problem of protection of privacy. Our preliminary inquiries in this direction indicated a serious and growing concern by distinguished jurists, scholars and men in public life throughout the Commonwealth and throughout the world with the grave threat that is posed to all free men and democratic institutions by modern technology and well-intentioned government and commercial practices that expose the individual to public and institutional scrutiny; that record and collate all his transactions; and that treat him as an object to be manipulated in the attainment of public, social and economic goals. The concern evidenced by the materials in our file on Privacy has been mirrored to a great degree by the growing amount of perceptive analysis and criticism in the Canadian press, as well as in the provincial and national legislative bodies in this country. The Canadian Bar Association at its meeting in Vancouver earlier this month adopted a resolution calling for controls over

certain forms of surreptitious invasions of privacy, and there can be no doubt that its concern is shared by many other responsible professional and private organizations and individuals.

In its last Annual Report the Commission identified the Right to Privacy as an important area of interest. Accordingly, in May 1968, the Commission arranged with Professor Edward F. Ryan, of the Faculty of Law, University of Western Ontario, to conduct a preliminary study of the problem of protection of privacy in this province. That study has now been completed and is attached as an appendix to this Report. Although Professor Ryan's study stands by itself, the Commission wishes to add that every part of the applied scholarship that it contains can be supplemented by evidence of practices that both shock the conscience and intensify the increasing apprehension that is felt in this province and in Canada for the need for protection of the privacy of the individual.

Professor Ryan's study is the first detailed study of this problem produced in Canada. It examines first the broad aspects of the problem and then deals with three important areas:

1. constitutional considerations;
2. the existing federal and provincial law; and
3. measures that should be considered in Ontario.

This study shows that a province has, both analytically and practically speaking, a considerable amount of room in which to legislate in relation to privacy. One of the major themes of the study is that privacy is a new field in legal and constitutional thought.

The portions of the study dealing with existing legislation take a critical look at those federal and provincial statutes that protect, threaten or affect privacy in some way or another. This review of statutes demonstrates

That individual privacy has very seldom been viewed as a separate aspect of legislation, that is something to be protected for its own sake, or as something that must be considered in legislation dealing with other matters of public, social or economic interest. Privacy has not been taken into account in most cases.

The heart of the study is the twenty-point proposal for measures that should be considered in Ontario, contained in Part Five. In a few words Professor Ryan has summed up the objectives that must be pursued if we are to re-establish the place of privacy in our modern world. These recommendations speak for themselves.

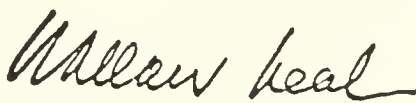
Professor Ryan's preliminary study has convinced the Commission that a full investigation of the problem of protection of privacy should be instituted at the earliest possible opportunity. Professor Ryan suggested in his study that a Royal Commission or a specially-constituted Task Force, having full powers under The Public Inquiries Act, would be the best vehicle for this purpose. The Commission agrees. It therefore recommends that either a Royal Commission or a special Task Force be established to undertake the necessary examination of the problem and to recommend the necessary legislative programme for the protection of the right to privacy in Ontario. For the reasons contained in the study, the Commission does not believe that either a departmental committee or a legislative select committee would be the appropriate body to deal with the matter.

Different considerations preclude a recommendation that the inquiry be conducted by this Commission. The number of projects which this Commission has now in progress would make it difficult for it to undertake the intensive empirical study that this topic demands. Nor does this Commission have the full range of necessary powers, such as the authority to call witnesses and examine them under oath, which will be essential for the identification

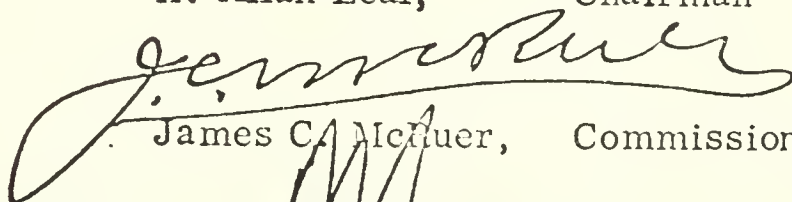
of the various manifestations of this problem and the recommendation of an appropriate legislative programme. However, the Commission is prepared to extend its full co-operation to the Royal Commission or the Task Force.

As indicated by Professor Ryan, the ideal study would be a joint federal-provincial project. This is highly desirable for several reasons. Even minimal federal activity may have the effect of excluding the detailed provincial legislative activity that is required to accomplish the goal of affording effective protection to privacy. Whatever is done in the federal Parliament should be designed to give the provinces full legislative freedom in relation to the multitude of commercial, professional and private enterprises and activities over which the provinces alone can exercise jurisdiction effectively. In addition, the study by this province will certainly indicate areas that require complementary federal laws, just as a comprehensive federal study, were one to be undertaken, would identify areas of primary provincial concern. If gaps and overlaps are to be avoided, a jointly-sponsored Royal Commission or Task Force would appear to be the proper solution. If such a joint arrangement is not feasible, the Commission recommends that the Government of Ontario proceed alone with a full study.

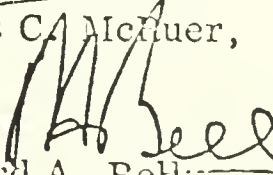
All of which is respectfully submitted,



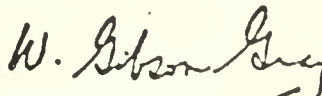
H. Allan Leal, Chairman



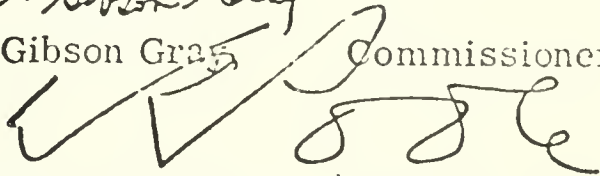
James C. McQuar, Commissioner



Richard A. Bell, Commissioner



W. Gibson Gray, Commissioner



William R. Poole, Commissioner

September 10, 1968.

APPENDIX

PROTECTION OF PRIVACY IN ONTARIO

A PRELIMINARY STUDY

Prepared at the direction of the Ontario Law Reform Commission

by

EDWARD F. RYAN
Assistant Professor
Faculty of Law
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London, Ontario

September 1, 1968

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PART ONE: AN INITIAL STATEMENT OF THEMES

I. The Right to Privacy: what is it?

The conclusion of the Nordic Conference on The Right to Privacy was that this term means the right to be let alone to live one's own life with the minimum degree of interference. In expanded form: The right of the individual to lead his own life protected against:

- (a) interference with his private, family and home life;
- (b) interference with his physical or mental integrity or his moral or intellectual freedom;
- (c) attacks on his honour and reputation;
- (d) being placed in a false light;
- (e) the disclosure of irrelevant embarrassing facts relating to his private life;
- ~~*~~ (f) the use of his name, identity or likeness;
- (g) spying, prying, watching and besetting;
- (h) interference with his correspondence;
- (i) misuse of his private communications, written or oral;
- (j) disclosure of information given or received by him in circumstances of professional confidence.¹

Even this comprehensive listing does not completely cover the area that might reasonably be expected to be protected by laws governing and protecting privacy. It deals only with individual privacy, as opposed to confidential matters relating to group or corporate existence. It also fails to advert to the problem inherent in the bona fide objective collection of facts relating (to name but a few) to the political, religious, economic, scholastic and medical status of an individual or group — the so called "data bank." These are considerations which must be viewed as coming within any discussion of privacy. As used herein, the terms "privacy" or "right to privacy" will include most or all of these aspects. More elaborate definitions are possible, but would not necessarily be of any more practical value.

II. Significant aspects of privacy under modern social conditions

"Privacy," like "civil liberty," has no core meaning in a legal sense. As Westin has so eloquently pointed out, it is a basic human psychological and physiological need.² It is also a socio-political claim in

1 Nordic Conference on the Right to Privacy, 31 Bulletin of the International Commission of Jurists 1, 2 (1967).

2 Westin, Privacy and Freedom, ch. 1 and 2 (1967).

the sense that certain beliefs, attitudes and activities cannot be made the subject of compulsion, involuntary disclosure or surveillance by either the government or the community in a democratic society. Privacy, at some time and in some form is a necessary attribute of virtually all elements of the intricate and varied components of the modern state: government departments, corporations, trade unions, families, fraternal and social bodies, and, of the greatest importance, individual people, who are still regarded as the basic moral and legal unit of society. All have significant and legitimate claims to privacy, and the common form of assertion of their claims is to be let alone or left unobserved or unsupervised in some aspects of their existence. Beyond this, each case is unique, and every element in the social fabric has special privacy needs which depend upon its function and role and relationship to all of the others.

Privacy is historically not something which has been legally protected for its own sake. Social custom is the primary force through which norms of privacy have been moulded and expressed, and our laws have generally reflected rather than created the individual enclaves that fall within the claim to privacy. The collective sense of propriety of legislatures, judges and ministers, as participants in and products of the social order, has been the major bulwark against legalized invasion of privacy, and beyond that the collective sensibilities of the society have served to define and re-define the scope of that which is legitimately public and that which is not.

Superimposed upon this self-sustaining, self-serving adjustment and balancing process, and perhaps more accurately regarded as an integral part thereof, are four tremendously vital forces in today's society: modern communications, modern economics, modern government and modern crime.

Modern communications have altered the ecology of traditional public value creation and assessment processes to the point where the mass media now define a considerable range of social norms and

condition public attitudes. They have an innate tendency to collectivize public thought and conduce towards conformity; and insofar as they do, even apart from the specific content of such matters as television programs,³ the premium on individual withdrawal or non-involvement that inheres in privacy is lessened.

The impact of modern economics can perhaps be best summed up by the simple observation that a balance sheet has no ethics. If the pressure of the marketplace so requires, the individual scruples of those who are charged with responsibility for management and control of the corporate structure are largely submerged under the need to show a profit at the end of the accounting period. This end can best be served by filling consumer demand and by creating such demand where none previously existed. This requires elaborate mechanisms for determining individual attitudes, wants and dislikes, and for manipulating these to the best advantage of the corporate group. While this process may be carried out under such heads as "freedom of choice" or "freedom of speech," the effect is to treat the individual as an object in pursuit of the goals of the market, with the same general result as described under the closely associated force of the mass media — a lessening of the control of the individual over his own beliefs, prejudices and wants. One of these is, of course, his freedom not to participate in all or part of whatever macroeconomic schemes that are considered to be most advantageous in terms of the institutional values guiding those who control the means of production. The trend is towards de-individualization and it is safe to predict that one of its results will be a conditioned lessening of the strength of claims that are based in privacy: the interest in not being made an unwilling factor in market research, the interest in not being made the object of commercial advertising, the interest in not owning a car or a telephone or a television set or the interest generally in being economically individualistic without being subjected to either major social disadvantage or to the pressure of being

3 Several writers in the field of privacy have commented on the possible effect of the spectacle of the forces of good tapping telephones, breaking into the homes and offices of the forces of evil, etc. The concern in the text goes beyond this particular aspect of modern communications — although its impact can scarcely be underrated.

thought to be eccentric by a peer group.

Worthy of mention under this head apart from these intangible conditioning forces is the direct invasion of privacy that grows out of the elaborate infrastructure of today's economic system. Successful business thrives on information, both of a statistical and an intelligence nature. The former is necessary, both to assess consumer demand trends, and to evaluate the success or failure of attempts to direct and control them. The latter is a function of an integrated economy, based largely on credit, in which each individual is coming to have as an attribute of his existence, a dossier which records his past movements, desires and transactions, evaluates his character and economic performance according to norms of good and bad based upon the yardstick of profit and loss, and predicts the probability of his future likelihood of engaging in either economically desirable or economically undesirable behaviour. Such records are collected and stored in the name of sound business practice by, among others, banks, insurance companies, collection agencies, finance companies, retailers associations, and specialized credit agencies which perform this service for those businesses that find it uneconomical to do so themselves. While the whole idea is distasteful to many, it has become a requirement for most, both merchants and consumers. It is not done to invade privacy but rather to serve economic interests, which in turn affords the fundamental rationalization of "service to the general prosperity." This phenomenon is perhaps a better example of Social Darwinism than anything produced from the pen of Herbert Spencer: it is in response to the challenge of major economic forces that a market economy assumes the optimum shape for implementing the dictates of its basic postulates, and without outside intervention (which Spencer and the modern business community would both oppose) the norm of data collecting will come to prevail over the norm of privacy. It is not that the one is more worthy of survival than the other. This implies that control of economic surveillance is responsive to the dictates of the same ethical system that

determines the attitude and behaviour of the individual. Rather, one is fitter to survive than the other in a social order where, absent legal regulation, the dynamic norms of economic positivism almost invariably prevail over the static norms of manners.

Modern government is the third major factor in the diminution of traditional conceptions of individual privacy. The minimum function state of the nineteenth century had as its by-product much of the present day attitude as to the "proper" role of government and the idea that it is possible to have, as a viable concept, a private area of individuality into which the state must not venture. However, these are value choices and not the inevitable result of any natural ordering of the affairs of either governments or individuals. The Great Depression, the Wars, and John Maynard Keynes have all conduced to a realization of the fact that the government can often be a highly effective means of organizing, allocating and protecting resources, maintaining employment, ensuing the general welfare and guiding the market economy. Accompanying this has been a major expansion of the domain of government services into such traditionally private citadels as education, medical care and welfare, as well as a marked increase in deliberate social manipulation.

These activities require enormous amounts of information. Starting from the premise that all government activities serve the common good or are in the public interest, the traditional norms of privacy vis-à-vis the public authorities inherited from earlier generations have given way to the idea that the state bureaucracy both must have and is entitled to have all the individual data that the responsible ministers and their delegates deem to be required for the efficient discharge of their public duties. No one can quarrel with the proposition that if the state is going to play an expanded role, supported by public funds, then it should have all the means and relevant data at its disposal in order to do this as effectively as possible, with a minimum wastage of tax monies.

As the state extends its activities into areas previously in the domain of the marketplace, it is subject not only to the norms of that which the writer has called economic positivism, but also to an input factor of private ethical attitudes through its representative character. There is a formal built-in mechanism for summoning ministers and governments to their constitutional fate should the interest in the expeditious dispatch of state business outweigh too greatly the current public attitude towards how far they should be allowed to go in this direction.⁴ Although this inherent regulating factor is a far more effective device than the individual has vis-à-vis the forces of the market, the state, through its capacity to translate "is" into "ought" in the name of the overriding public interest, can and does quite effectively condition public and individual attitudes towards privacy (among many others) in favour of maximum disclosure of all facts that it sees as desirable or necessary for the proper performance of its duties. So long as privacy remains as an unprotected aspect of the individual personality, unchampioned as a value by the state itself, the assertion of the right by modern government to unimpeded access into this domain will, subject to episodic attempts by the electorate to redress the balance, ultimately prevail.

Pound has described this process vividly:

When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest, we may decide the question in advance in our very way of putting it If the one is thought of as an individual interest and the other as a social interest, our way of stating the question may leave nothing to decide.⁵

4 Ontario's Bill 99 of 1964 provides an uncomfortable, if apt, example. Elections are, of course, another. A third and more homely instance occurred in London, Ontario in July, 1968, when the Board of Control discussed the idea of selling its list of names and addresses of the owners of licenced dogs to a dog food manufacturer. Public pressure forced the Council to keep this information "private." The decision to attempt to buy the list was a logical corporate response to the dictates of economic positivism. The decision by the Board not to sell represents the result of considering both the public interest in raising municipal revenue and the possible reaction of the electorate, especially the dog owners. In this case, the latter prevailed: London Free Press, p. 35, 17 July 1968.

5 Pound, A Survey of Social Interests, 57 Harv. Law Rev. 1 (1943).

Modern crime enjoys, deservedly or not, a public image of being a systematically organized, integrated and self-sufficient whole. The protagonists of criminal anti-social activity have progressed from "the criminal class" to "electronic age crooks,"⁶ the control and suppression of whom can no longer be accomplished through game-theory rules originally devised to deal with the individual criminal entrepreneur.

The logical response to this new situation, and one with which most thoughtful citizens would agree, was well stated by the late former Attorney-General of the United States, Robert Kennedy:

Intelligence — the most detailed information obtainable on the background and activities of suspected criminals — is essential to all law enforcement. It is even more important to successful action against racketeers.⁷

Aside from a few formal and traditional requirements imposed by law,⁸ the intelligence-gathering function of the police is a matter of internal discretion and self-restraint. The need to maintain public confidence and cooperation is a well recognized factor in guiding the police, helping to ensure that the private ethical values of the society at large are not replaced to an excessive extent by those functional institutional values which define "good" and "bad" police activity through results obtained in the adversary setting of the criminal trial.

An appreciation of the existence and implications of this dual system of values is essential to an understanding of the privacy problem inherent in the conception of modern crime. The rational approach to its solution is in danger of becoming lost in the conflict between "opposing demands that have no living contact with one another, that simply shout

6 Toronto Globe and Mail, p.1, 9 Aug., 1968.

7 Attorney-General Kennedy, quoted in Report of the Ontario Police Commission on Organized Crime, 31 (1964).

8 E.g., federal and provincial legislation requiring search warrants; rules of evidence relating to admissibility of confessions and admissions; common law rules of trespass; section 25 of the Bell Telephone Act (interception of messages) (discussed in detail elsewhere in this report).

their contradictions across a vacuum." ⁹ Thus, a Toronto police spokesman, in calling for a legitimized procedure for wiretapping said:

Law enforcement officers don't want a police state ... but 'they cannot hope to achieve an acceptable degree of effectiveness, if the apathetic attitude and the present lack of [public] support continues.' ¹⁰

A civil liberties spokesman, in calling for its total ban, wrote:

[E]lectronic eavesdropping is an extremely useful tool in the hands of the police. So too would be the right of indiscriminate interrogation, general use of writs of assistance and many others.... Certainly the dominant value in our society is not police efficiency. ¹¹

The result is a continuing process of public education by conscientious and highly placed police officials designed to convince the public that the threat of, e.g., "Mafia-like syndicated crime controlled by American Gangsters" ¹² requires police methods that impinge upon the commonly held view of the domain of individual privacy, and that this domain should properly be charted in accordance with functional police values rather than the traditional ethical values. Such authoritative pronouncements cannot help but cause the individual to wonder whether any resistance to this idea on his part is inimical to the common good, the concern for which both he and the police share. The equally authoritarian pronouncements of the civil libertarians tend to downgrade the functional value of police efficiency without being of much assistance on the issue of how best to control the "electronic age crooks." In the absence of any general public sensitivity to the fact that the police response to modern crime is capable of being measured according to a dual system of values under which

9 The quoted words are Fuller's.

10 Syd Brown, as reported in The London Free Press, p. 8, 13 July, 1968.

11 Aubrey E. Golden, Report of the Chairman of the Committee to Survey Invasions of the Rights of Privacy by Technological or Electronic Devices to the Chairman of the Civil Liberties Section of the Canadian Bar Association, p. 7, 31 August, 1966.

12 This is the description accorded to certain criminal activities in Quebec by the Ontario Police Commission. Report of the Ontario Police Commission on Organized Crime, 118 (1964).

antagonistic positions relating to individual privacy each have independent validity, the thoughtful citizen can only come to doubt the propriety of the dictates of his own ethical code. Any solution to the privacy problems posed by the need to control organized or syndicated crime can only be arrived at by dealing with the police and the public attitudes towards the invasion of privacy in terms of the value systems which govern each. The limits for the police should be defined in terms of functional values set down by law which fail to reward unregulated incursions into privacy, thus creating a situation whereby police efficiency is at its maximum point before an unacceptable level of police invasion of privacy is reached. The legitimizing tendency of deliberately chosen definitive rules will have the collateral effect of preventing the loss of efficiency that otherwise occurs from the loss of public confidence.

The limits for the individual's claim to privacy can be validly contracted if it can be shown that the uncontrolled nature of modern crime poses a greater threat to other values in his ethical hierarchy than the threat of controlled police surveillance creates for privacy. Just as public confidence is a functional value for the police, police efficiency has an ethical standing for the individual. However, it must be absolutely clear that the loss of individual privacy is accompanied not only by a gain in police efficiency but also by a reduction of a serious and concrete threat posed by changing patterns of anti-social behaviour. The writer has already expressed agreement with the position that the individual, rather than the institutions that he has collectively created, is the basic moral unit of the society. As long as this continues to be a valid premise, then the reality of an assault by modern crime that is not capable of being controlled by traditional police methods, rather than the public image of the spectre of gangsterism, must be the sine qua non of any state sanctioned institutional surveillance of the private affairs of individuals. Furthermore, the threat of modern crime must not be allowed to become the single motive for authorizing a major increase in police efficiency, if it can be shown that ineffective protection is attributable to many

causes. 13

These major institutional pressures upon something that is based primarily in each individual's own view of himself and his relationship to others and to the group cannot help but result in a lessening of the strength of the claim to privacy, and a narrowing of the meaning of "invasion of privacy." The technology now exists to observe and record almost every human transaction. Although much of that which is being done is and will continue to be viewed as illicit per se — for example, blackmail and industrial espionage — the general headings under which the assault on privacy is being made are not nearly so sinister: the public right to be informed, economic efficiency, police efficiency, governmental efficiency and social utility. Viewed separately, they are all desirable and justifiable ends. Collectively, they amount to an overwhelming pressure for a reordering of human values.

A listing of some of the infinitely varied means to these desirable and justifiable ends only bears out the observation that on an individual basis, the elements of the invasion of privacy are fairly innocuous in the main, and are each capable of some justification:

-
- 13 A John Howard Society psychologist once observed to the writer that we could eliminate the rising crime rate by repealing the Criminal Code. The serious implications of this half-serious remark lie in the fact that in attaching criminal sanctions to, e.g., gambling and off-track betting, we have created an instant illicit black market from which organized crime draws its major revenues, and which flourishes in an atmosphere of corruption, extortion and sometimes violence. Organized crime also operates in the fields of prostitution, bootlegging, and narcotics. Along with seriously considering increased police surveillance of the citizenry as a means of control of these activities, thought should be given to alternatives which might be accomplished at an overall lower social cost: legalizing licenced bookmaking, removing the aura of a status crime from prostitution, relaxing the strictures on the legal means of obtaining liquor and furnishing narcotics to registered addicts. A second approach to the problem could be taken by a major increase in pay, standards and training of the police. These alterations to the nature of the disease may attenuate the necessity for harsh and irreversible cures. If we are faced with a choice between order and freedom, we would be well advised to consider carefully our definition of disorder before manipulating the dimensions of freedom.

Government Intrusions into Privacy: Firearms registration, automobile registration, liquor licences, taxi licences, fingerprints, mental hospital records, court records, vital statistics, the census, armed forces records, education records, property records, tax records, welfare records, old age assistance records, security clearances, government employment records, police intelligence files, required disclosures for corporations, promoters, and securities vendors, fire department records, driving records, passport records, venereal disease records, voters lists, police wiretaps and electronic surveillance.

Private Intrusions into Privacy: Employment of private investigators to obtain as much information from government records as is an ill-defined "public domain," credit reports, records on receptivity to salesmen and buying habits, airline travel records, hotel records, car rental records, medical and psychiatric records, insurance records, professional records, education records (an overlap), telephone company records, community directories, job applications, polygraph records, in-depth psychological tests (which, with polygraph tests, may be a condition of either obtaining or continuing in employment), private background investigations, divorce information, hidden security devices (television, movie and still cameras, tape recorders), newspaper files.

All of the activities which result in the compilation of these various records (and this is only a small part of the whole) have some claim to legitimacy in our highly integrated modern society. To visit upon them any blanket condemnation in the name of privacy would be tantamount to demanding the abolition of the very mechanisms for the ordering of today's state. A desire to return to the past may be understandable; it is also visionary, if not absurd. The listed items, operating in the milieu of the major forces described on the preceeding pages are a fait accompli in a progressing social revolution. When either government or the private sector feels confident enough of its position to collate all of this information in a single data retrieval centre, then the revolution will devour its children. In the absence of timely intervention, the individual norms of privacy will continue to be subjected to piecemeal disintegration, until they are no longer capable of exercising any significant influence upon the direction of social development. This is not alarmism. Rather, it involves an appreciation of three basic facts. The first is that each new invasion of privacy is invariably accompanied

by attractive advantages. In-depth psychological testing to determine whether or not to hire a job applicant seems to be a such fairer and more rational method of selection than subjective standards which may turn upon race or religion or family connections or the "proper" school tie. Second, incursions into privacy are self-justifying. If the public accepts the necessity for requiring drivers to identify themselves, then "it is difficult to justify the distinction if the citizen is proceeding on foot." ¹⁴ Third, and perhaps of greatest significance, is the fact that in view of the very extent of the public and private activities listed above, individual standards of privacy become increasingly relativistic, and each new investigation, or request or demand for personal information creates only an impalpable addition to a confusing whole. It is becoming extremely difficult in many cases for a perceptive individual to discern whether or not any given activity subjects him to an increased quantum of surveillance or, if you will, "invades his privacy," because there remain so few fixed devices with which to measure the legitimate extent of his claim thereto.

Having drawn this bleak and rather despairing picture, the remainder of this report will go on to suggest directions in which thoughtful inquiry ought to go, and will consider the legal and constitutional aspects of the problems and the alternative solutions that are wrapped up in the topic of invasion of privacy.

There are two requirements which must be kept in mind, and which are absolutely essential to any rational approach to the protection of privacy. These are (1) The necessity to establish control over a situation which is presently out of control, and (2) The need for making individual qualitative judgments on the plethora of aspects that this subject has. Without a recognition of the importance of both of these, the future existence of privacy as an adjunct of human personality, whether expressed as an ethical or a legal claim, is in serious danger.

14 Statement of the National Conference on the Prevention of Crime, Report of the Proceedings, 70, (1965).

III. The locus of constitutional power in relation to privacy in Canada

The right to privacy, generally speaking, is something which bears the characteristics of a true civil liberty, as defined by former Dean Mark MacGuigan: "a negative, laissez-faire, let-me-alone kind of freedom."¹⁵ He goes on to make the point that Parliament has jurisdiction over "substantially the whole area of civil liberties."¹⁶ He defends this position by invoking the federal residual power and the power to legislate in relation to the criminal law.

Schmeiser lists a variety of different legal and logical possibilities, all of which have been voiced at one time or another by persons and bodies entitled to the highest respect. These are:

1. Jurisdiction over any given civil liberty resides in the legislative body with power to interfere with it.
2. Provincial legislative jurisdiction is unlimited with regard to basic freedoms.
3. Parliament has unlimited jurisdiction over civil liberties under its residual and criminal law powers.
4. Basic liberties are not committed exclusively to either level of government, but are divisible by their aspects.
5. Neither Parliament nor the provinces may interfere with traditional liberties because of the Preamble to the B. N. A. Act.
6. Basic liberties are guaranteed by implication by various specific sections of the B. N. A. Act.
7. Rights based on natural law cannot be taken away by the positive law of any legislative body.¹⁷

There have been very few occasions in Canada when "civil liberties" has been dealt with in the courts as a unified concept. Nor is the experience of the United States or that of England of any great value in determining the answer to the narrow question of where civil liberties fits into

15 MacGuigan, Civil Liberties in the Canadian Federation, 16 U.N.B. L.J. 1, 4 (1966). MacGuigan includes in this classification political, legal and egalitarian civil liberties, and excludes economic, cultural and minority rights. While the right to privacy fits MacGuigan's definition, his article did not advert specifically to this right. Unless otherwise noted, the text uses the terms "civil rights" and "civil liberties" interchangeably, i.e., as synonymous with each other and with "fundamental" or "basic" rights or liberties, rather than whatever meaning "civil rights" may have under section 92 (13). See infra note 18.

16 Id. at 14.

17 Schmeiser, Civil Liberties in Canada, 13-16 (1964).

the Canadian constitutional scheme. In the United States, enumerated basic rights and their judicially fostered offshoots are protected against encroachment by either state or federal legislation by a constitutional Bill of Rights, and the question of legislative competence in a federation does not arise. United States laws protecting or implementing basic rights are in many ways more akin to Canadian regulations than they are to Canadian legislation, and they may either be superfluous or run the risk of being struck down should their scope differ from the definitive views of the judiciary. In England, basic rights are not formally enumerated and are generally not the subject of legal definition in the analytical sense, although, at least in theory, it is possible for Parliament to make any sort of declaratory or substantive law in relation to any subject, including basic rights, that it sees fit. There has never been any need to create a special legal category of civil liberties in England, and as long as Canadianstry to think in terms of categories, the English legal position will not serve to assist our thinking or constitutional analysis.

Despite the facility to our thinking that can be gained by viewing civil liberties or civil rights as a block which can or should be fitted neatly into a niche in section 91 or 92 or the Preamble to the B.N.A. Act, or where you will, there is no a priori test, based on principle or authority that can be applied either to determine analytically what a civil liberty is, or which level of legislative authority has jurisdiction to protect, abrogate or foster that which might be said to be one. Until such a test is devised, we are left with the position that civil liberties¹⁸ are, in constitutional jargon, an "overlapping field," in which both Parliament and the provincial legislatures are free to legislate on the basis of competence bestowed under their respective enumerated heads of power.¹⁹

18 As MacGuigan points out, "civil rights" as used in section 92 (13) is not necessarily the same as "civil liberties" under the interchangeable useage in the United States: MacGuigan, supra note 15 at 12. Schmeiser also makes a similar observation: Schmeiser, op.cit. supra note 17 at 75-78.

19 Cf. Laskin, Canadian Constitutional Law 939 (2d. ed. 1960): "In Canada, as the generality of judicial doctrine indicates, the constitutional issue in 'civil liberties' legislation is simply whether the particular suppression or enlargement is competent to the Dominion & to the Province, as the case may be."

Even though the Province of Ontario is probably precluded from enacting legislation to define and protect privacy on the basis of a separate legislative jurisdiction to deal with civil rights or civil liberties in the broad sense, it has constitutional competence to enact laws which will have the effect of creating, shaping and controlling a right to privacy through the device of associating these laws with its enumerated heads of power in section 92. To the true civil libertarian this may seem to be an unfortunate subterfuge — one that begs the issue as to whether the objective is to protect basic values as ends in themselves. However, this approach is not yet with us. Just calling privacy a basic right doesn't necessarily make it one, nor does it necessarily import into the discussion any constitutional difficulties related to issues of jurisdiction in the abstract over such matters. A Privacy Commission or Ombudsman or Czar could be created by a province to operate within a previously unknown conceptual domain, as has already been done with the Human Rights Commission, without having to look beyond the confines of section 92. The major consideration in creating a provincial de facto basic right of privacy is not one of constitutional jurisdictional limitations, but one of technique, particularly in avoiding areas of federal legislative occupation. The effectiveness of the modus operandi of the mechanisms created to ensure supervision, enforcement and review of adequate remedies provided by legislative enactments that are within provincial competence will ultimately determine whether or not privacy is a basic human right in Ontario. The fact that it should be such, or a basic human right in Canada, does not alter the balance of constitutional powers in either direction. This does not mean that Parliament cannot follow Dean MacGuigan's suggestion to take charge of basic freedoms as an area of independent constitutional existence, but rather that until such an eventuality comes to pass, each province can, and in the writer's opinion, must cultivate its own jurisdictional garden in relation to privacy.

PART TWO: SALIENT CONSTITUTIONAL CONSIDERATIONS

I. Provincial jurisdiction to make invasion of privacy a statutory offence

A recent commentary²⁰ on the British Columbia Report of the Commission of Inquiry into Invasion of Privacy observed that it is arguable whether or not a province has the constitutional authority to create an eavesdropping crime. The authority cited was a story in the Vancouver Province appearing on August 16, 1967, in which former Attorney-General Robert Bonner was said to be doubtful whether "the provincial legislature had jurisdiction to enact laws forbidding invasions of privacy."²¹ Although the writer has not seen the newspaper, it can be safely assumed that Attorney-General Bonner was referring to the power to make invasion of privacy an offence against a provincial statute, rather than to any provincial disability to create a civil tort action. On the other hand, the Commissioner, Judge Sargent, came to the conclusion that "the Provincial Government is competent to enact the legislation making eavesdropping a crime."²²

Attorney-General Wishart has indicated "that there is an area where the province might properly legislate with respect to eavesdropping and the electronic items that are used for this purpose,"²³ but has consistently adhered to the position that control of wiretapping and electronic surveillance should be handled at the federal level. "The subject is closely related to criminal law and might well be associated with it in this programme of regulation."²⁴ More recently, Attorney-General Wishart stated "The whole system points to a federal law..."²⁵

20 Atrens, Comment on the Report of the Commission of Inquiry Into Invasion of Privacy, 10 Crim. L.Q. 138 (1968).

21 Id at 143.

22 Report of the Commission of Inquiry into Invasion of Privacy, British Columbia, 53 (1967).

23 Legislative Debates, Ontario, 8 July, 1968.

24 Id., 31 January, 1967.

25 Id., 8 July, 1968.

Assuming the absence of federal law, and that legislation designed to make some forms of invasion of privacy a provincial offence is thought to be desirable, the question of legislative constitutional authority is raised in its pure form. The objection to provincial legislation in this area can be stated as follows:

1. Eavesdropping was a crime at common law.
2. Legislative jurisdiction over this crime passed to the Parliament of Canada at Confederation.
3. Any attempt by a province to create a statutory offence out of conduct that formed a part of the criminal law at the time of Confederation is ultra vires as an encroachment upon the exclusive federal power under section 91 (27) of the B. N. A. Act.

Assuming further that wiretapping and electronic surveillance fall within the rubric of common law eavesdropping (in itself a doubtful proposition), then it would follow that if this syllogism is correct, the province cannot make eavesdropping in its modern form a statutory offence. A study of the relevant law indicates that this possible objection to the exercise of provincial legislative power does not exist.

A. Was eavesdropping a crime at common law?

Although well established in legal folklore, this proposition is incorrect. This activity was brought within the cognizance of the courts by the Justices of the Peace Act of 1361, which granted to the Justices authority "to take of all of them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people...." ²⁶ This jurisdiction to compel the giving of sureties has since come to be called "binding over" or "binding over to keep the peace" and is generically known as "preventative justice."

The Act of 1361 does not mention eavesdroppers per se, but rather addresses itself to the restraint of "Offenders, Rioters and all

26 What sort of Persons shall be Justices of the Peace; and What Authority they Shall Have, 34 Edw. 3, c.1 (1361).

other Barators likely to cause breaches of the peace." ²⁷ Russell on Crime states that this Act covers spying, peeping and eavesdropping. ²⁸ Blackstone wrote that "Eaves-droppers, or such as listen under walls and windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischevious tales, are a common nuisance and presentable at the court-leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour." ²⁹ Glanville Williams has also written that the jurisdiction to bind over given in the Act of 1361 covers eavesdroppers, night-walkers and common scolds — matters which he describes as "immoral or anti-social conduct not amounting to an actual or threatened breach of the criminal law." ³⁰

In a 1948 case, Lord Goddard, after reviewing the Act of 1361, Blackstone, Dalton's Countrey Justice, and other authorities, stated that eavesdropping, along with other instances of common nuisance, was never an indictable offence, and that "no instance can be found in the books of any indictment being preferred for this offence at common law." ³¹ His conclusion was: "It follows, therefore, that nobody can be convicted of eavesdropping...." ³²

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- 27 O'Halloran, J. A., observed in Frey v. Fedoruk, Stone and Watt, 95 C.C.C. 206, 233 (1949) (B.C.C.A.) that the Act of 1361 appears to be directed to the peculiarly unsettled conditions in much of England -- bordering on rebellion -- which prevailed during the latter part of the 50-year reign of Edward III."
- 28 Russell on Crime, 1398 (12th ed. 1964).
- 29 4 Blackstone, Commentaries 168 (15th ed. 1809).
- 30 Williams, Criminal Law, 716 (2d ed. 1961).
- 31 The King v. County of London Quarter Sessions Appeal Committee, [1948] 1 K.B. 670, 675 (C.A.). The main issue was whether the petitioner had been "convicted" and was entitled to an appeal under the English statutes governing procedure in criminal matters. Hence the judgment in the case (to the effect that the petitioner had not committed an offence and was therefore outside of the criminal law) as well as the discussion of eavesdropping, is of constitutional interest in Canada.
- 32 Ibid.

The Canadian jurisprudence, such as it is, points to a similar result. In Re MacKenzie,³³ a case of common nuisance, the petitioner sought to appeal the dismissal of his motion for habeas corpus. MacKenzie had been sentenced to imprisonment for failing to find sureties, after being bound over for making harassing telephone calls. The issue was whether preventative justice was criminal in nature (for which no appeal is provided under habeas corpus proceedings) or civil in nature, in which case an appeal lies. The Ontario Court of Appeal held that the common law jurisdiction to administer preventative justice is a civil proceeding.

In 1948, C. R. Magone, K.C., the Deputy Attorney-General for Ontario, considered the question which was raised but not decided in Re MacKenzie as to whether Magistrates and Justices of the Peace could 'administer 'preventative justice' and ... deal with complaints against 'peeping Toms,' 'eavesdroppers,' and others 'whom there is a probable ground to suspect of future misbehaviour' "³⁴ He concluded that this power was vested in these functionaries by virtue of the commission granted by the Lieutenant-Governor in Council and by the Act of 1361, which, he felt, was in force in Ontario.

In 1949, in Frey v. Fedoruk,³⁵ the British Columbia Court of Appeal held that the Statute of 1361 was not in force in that province. The issue was whether or not one Frey had been falsely arrested for being a peeping tom. The Court held that even in the absence of any specific provision in the Criminal Code, the act of peeping or prowling at night was a breach of the King's Peace and a common law crime, and his arrest had been justified.

33 Re MacKenzie, [1945] O.R. 787 (Ont. C. A.).

34 Magone, Annotation, 93 C.C.C. 161 (1948).

35 Frey v. Fedoruk, Stone and Watt, 95 C.C.C. 206 (1949) (B.C.C. A.).

On appeal to the Supreme Court of Canada,³⁶ it was held that on no view of the law could it be said that a criminal act had been committed. The conduct in question was "contra bonos mores, but not contra pacem in the sense of being a breach of the criminal law,"³⁷ and the view of Lord Goddard to the effect that nobody can be convicted of eavesdropping or night-walking was cited with approval.³⁸

As to the issue of whether or not peeping or eavesdropping or any other such conduct in different circumstances might be viewed as a breach of the King's Peace or criminal law in the future, under any inherent common law power in a court, the Supreme Court held that "this power has not been held and should not be held to exist in Canada . . . [N]o one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the provisions of the Criminal Code, or can be established by the authority of some reported case as an offence known to the law."³⁹

The result is that eavesdropping never has been a common law crime, either in England or in Canada; and further, that no court in Canada ever had or ever will have the power to make it a crime.

36 [1950] S. C. R. 517.

37 Id. at 527.

38 [1950] S. C. R. at 527.

39 Id. at 530. The second branch of this statement is of course now of no consequence following the incorporation of the first branch into section 8 of the revised Criminal Code. It should be pointed out that there is one reported case in Anglo-Canadian legal history. 578 years ago "John Merygo, chaplain" was presented at the Leet Court of Norwich as being "wont to listen by night under his neighbours' eaves, and is a common night-rover." Leet Rolls, 1390-91, Selden Society, Vol. 5, p. 70. The reported result was "40 d., arrest," but there is no way of knowing whether this was a fine or a recognizance. The Leets handled criminal and correctional jurisdiction, including public and private nuisances. It would be unusual, to say the least, to believe that the result in Frey v. Fedoruk would have been any different had this case been brought to the attention of the Supreme Court.

B. Did legislative jurisdiction over eavesdropping pass to the Parliament of Canada at Confederation?

Although legislative jurisdiction over criminal law was vested in the Parliament of Canada, it has been uniformly held that preventative justice causes are civil, not criminal in nature.⁴⁰ While Parliament may make any of the activities in respect of which preventative justice has been exercised punishable as crimes, it is clear that the province has constitutional jurisdiction to enact "legislation ... aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime."⁴¹

As a result, the B.N.A. Act did not give Parliament any specific mandate to deal with eavesdropping, peeping, or any of the other activities that were regarded at common law as common nuisances. Insofar as these activities were dealt with by the courts of criminal jurisdiction, they have been classified as matters of preventative justice, and are therefore under provincial jurisdiction. Thus the second term in the syllogism is also incorrect.

C. Would an attempt by a province to create a statutory offence out of conduct that formed a part of the criminal law at the time of Confederation be ultra vires as an encroachment upon the exclusive federal power under section 91 (27) of the B.N.A. Act?

This conclusion assumes two things. The first is that eavesdropping was a part of, or so closely associated with as to be

40 Re Mackenzie, [1945] O.R. 787 (Ont. C.A.); The King v. County of London Quarter Sessions Appeals Committee, [1948] 1 K.B. 670 (C.A.); Frey v. Fedoruk [1950] S.C.R. 517; Williams, op. cit. supra note 30.

41 Bedard v. Dawson, [1923] S.C.R. 681, 684 (Duff, J.). See also Reference re Authority to Perform Functions under the Children's Protection Act, etc., [1938] S.C.R. 398, 403 (Duff, J.). There were cases cited by the Ontario Court of Appeal in Re Mackenzie, supra note 40, for the proposition that "to restrain the liberty of a subject where there has been no crime committed is, beyond question, an interference with a civil right, and it would seem equally clear that the law that warrants it cannot be criminal law in the proper sense.... [T]he Province may legislate upon such a matter. ..."

indistinguishable from the criminal law before 1867. The second is that all of the common law of crimes existed as a discrete conceptual body at Confederation and any matter that partook of the parameters thereof became an exclusively federal matter. The first assumption, as detailed above, appears to be groundless, but must be taken as proved, at least in part, for the sake of analysis of the ultra vires argument. The second assumption depends upon the theory that there is a domain of criminal law which passed under federal cognizance by virtue of section 91 (27) of the B. N. A. Act, and upon which no provincial legislation may trench, even in the absence of federal occupation of the field.

The dimensions of section 91(27) have been measured by many formulae, two of which are immediately relevant: (1) was the subject matter of the legislation in question a criminal offence by the common law or statute law of England prior to Confederation? ⁴¹ and (2) is the subject matter "one which by its very nature belongs to the domain of criminal jurisprudence?" ⁴² Since it has been demonstrated that eaves-dropping was not a specific criminal offence in England, the only remaining question is whether its association with the criminal process in England brings it within the "domain of criminal jurisprudence." This, in turn, directs the inquiry to the question of whether or not such a domain exists in Canadian constitutional law. Despite some Privy Council references to this conceptual castle, the answer is no. The Supreme Court recently examined and rejected the domain theory, holding that "In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation must be looked at." ⁴³

The conclusion can be drawn that whatever may have been the English view of a coherent doctrinal body of criminal law prior to 1867,

41 Quimet v. Bazin, (1912) 46 S. C. R. 502, 508.

42 In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919, [1922] 1 A. C. 191, 198-99 (P. C. Can.).

43 Lord's Day Alliance of Canada v. Attorney-General for British Columbia, [1959] S. C. R. 497, 503. Again at p. 509: "[N]o such 'domain' is recognized by our law."

such a concept was not imported into the Canadian constitutional scheme; and even if eavesdropping was on the fringes of the English domain of criminal law, its amenability to legislative jurisdiction followed the division of powers in the B. N. A. Act rather than passing automatically into the federal sphere under section 91 (27).

The next conclusion that may be drawn is that even if prohibition of invasion of privacy were equated with prohibition of eavesdropping, then a provincial statute with penal consequences directed to this end would not be invalid because it encroached upon the general federal criminal power.

II. Has Parliament occupied the field? A profile of relevant federal legislation.

A. Criminal Law

(1) Section 162, Criminal Code of Canada.

In the 1955 revision of the Criminal Code, Parliament included the following section:

Trespassing at Night.

162. Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.

In the opinion of Judge Sargent, in the only reported case interpreting this section, it was "enacted to fill the void in our criminal law, disclosed by the decision of the Supreme Court of Canada in Frey v. Fedoruk ... otherwise known as the 'Peeping Tom' case." ⁴⁴

Since there never has been any clear distinction between eavesdropping and peeping, or even any authoritative definition thereof, it would be a conservative assessment of the situation from the point of view of provincial legislative jurisdiction to conclude that Parliament has partially occupied the field, at least to the extent that the gravamen of these activities was a

44 Regina v. Andsten and Petrie, 128 C. C. C. 311, 314 (1960) (Vancouver County Ct.). Affirmed on appeal, 128 C. C. C. 316 (1960) (B. C. C. A.).

physical presence upon the property of another. By the same token, the new federal crime speaks only to physical presence and not to the purpose therefor, the only qualification being that the trespasser not have a lawful excuse. "Lawful excuse" was defined as "a purpose or reason much as one might be expected to have in the conditions existing." ⁴⁵

Although the section would have caught the situation in Frey v. Fedoruk, which involved trespassing by night and peering in a window, it would not cover peering in a window with binoculars across a property line. Nor would it cover any listening in upon conversations that did not involve a physical presence upon the protected property. Since neither of these forms of spying were available much before the twentieth century, it is a futile exercise to speculate whether or not the common law restraints were aimed at the prohibition of the seeing or overhearing involved in peeping and eavesdropping, or the physical trespass that, given the limitations upon our senses, invariably must accompany any unassisted attempt to peep or overhear. This distinction was never made for the simple reason that the common law prior to, say, 1867, had neither the occasion for or need to define the constituent elements of either eavesdropping or peeping.

It would follow that the federal enactment in section 162 of the Criminal Code cannot be said to have occupied the field because this would necessarily involve the postulation of a pre-existing conceptual domain. Such never existed at common law, and hence, section 162 simply prohibits exactly what it purports to prohibit: (1) presence without lawful excuse upon the property of another (2) at night (3) near a dwelling house. No higher abstraction that can be styled "eavesdrop" is capable of being invoked by the elements of the section 162 offence to the extent, for example, that the section could be said to extend to the prohibition of the overhearing of a conversation. The situation might be different had there been an eaves-

⁴⁵ Hagan v. Ridley, (1948) 50 W. A. L. R. 112, quoted with approval, 128 C. C. C. 318 (B. C. C. A.).

dropping crime at common law, aimed at the prevention of surreptitious listening, which was punishable either upon proof of actual covert overhearing, or upon proof of presence upon the property of another by night near a dwelling house giving rise to a situation similar to that of recent possession in which the jury might have, but not necessarily must have, convicted the accused of covert overhearing, absent a reasonable explanation of his activities. Had this been the case, the elements of section 162 might be said to attract the abstraction of common law eavesdrop, and occupy the field. But no such abstraction existed at common law, and the Criminal Code only serves to proscribe trespassing at night.

Even in the absence of any historical common law domain of eavesdropping, it may be logically argued that section 162 includes or has as one of its ultimate objectives the protection of privacy. The protection against intrusion across the boundaries of real property is not necessarily an end in itself, and the historical antecedents in the law of tort and property that point the other way may simply be the result of the mechanizing or "slot machine" tendency of our particular legal system to adapt the code of behaviour to instruments of control that are susceptible to physical observation and measurement. It is infinitely easier to attach sanctions to movement across a certain line than it is to develop, organize and define a hierarchy of principles that inhere in the legal personality of the land owner for the protection of which the trespass by another is prohibited. The result has been that individual interests in privacy, to the extent that they can be said to have been recognized at all, have been protected under the scope of property laws. Trespass to land was historically a matter of strict liability⁴⁶ long before the law was capable of conceiving of a right to privacy per se, and the sanctions attached to the former have proved until recently; sufficient to protect a great deal of that which is capable of being subsumed under the latter. Any claim to protection

from the law against invasion of privacy ends at the perimeter of the close.

The relationship between privacy and trespass at common law was reviewed in a 1959 issue of The Law Times with these conclusions:

[A]ncient authority is to be found for the proposition that in English law the natural rights of an occupier do not include freedom from view and inspection of neighbouring occupiers Of course where there is an actual entry on land the law of trespass gives a remedy against the invasion of privacy. . . . [B]ut if . . . the defendant commits the annoyance from the other side of the road there is, normally, no protection that [the occupier] can have under the civil law. . . . English law therefore does not accept that freedom from being overlooked is a natural right appertaining to land for which a legal remedy is given either by an action for nuisance or otherwise.⁴⁷

In the United States, the Supreme Court repeatedly tied the question of admissability of surreptitiously obtained wiretap or electronic eavesdrop evidence to the matter of a physical trespass. It wasn't until 1967 that the Court was able to view those aspects of privacy that are guaranteed by the fourth amendment as functions of the constitutional protection of the person rather than functions of the protection of real property, and that wiretap evidence obtained even in the absence of any trespass was inadmissable on constitutional grounds.⁴⁸ The pre-1967 position in the United States is an excellent illustration of the almost irresistible tendency of the common law system to tie as many rights as possible to ownership and occupation of land, as well as of the fact that in the absence of sweeping pronouncements of constitutional dimensions, the unaided common law position on freedom from annoyance, surveillance and many forms of tangible and intangible interference with

47 Unsigned, Privacy and the Law, 228 L. T. 234 (1959).

48 Katz v. United States, 88 Sup. Ct. 507 (1967).

the person remains closely tied to ideas defined by and functioning within the limits of the conceptual superstructure of the law of real property.

The vector seems to point, as far as these historical considerations can be said to be relevant, to the conclusion that privacy, security, freedom from interference on one's own land, etc., are merely incidental to legal restraints against trespass by others. The absence of a developed jurisprudence of rights in Anglo-Canadian law, as divorced from restraints upon inimical activities by others,⁴⁹ assists in reaching the conclusion that section 162 can and probably should be viewed as limited to attaching a state sanction to conduct (trespass by night) which the law contemplates as being undesirable in itself without its being any more of a declaration for the protection of privacy than was the civil tort of trespass directed to this particular end.

In the section 162 case, which involved the activities of private investigators, Judge Sargent held that "this section makes the ... tort [of trespass] a crime."⁵⁰ In the same case, the British Columbia Court of Appeal held that the unlawfulness of the conduct charged did not lie in the fact that the accused were investigating the conduct of the householder, ("that purpose is a lawful one"), but rather in the fact that in carrying out this lawful design, they had committed a trespass.⁵¹

Thus history, principle, and the paucity of authority available all indicate that the correct view is not to look behind the trespass

49 As Austin wrote in Jurisprudence, Lecture VI, "[C]ivil liberty is the liberty from legal obligations" and to assert that subjects should have rights which did not involve the imposition by positive law of restraints on other subjects, was "absurd."

50 Regina v. Andusten and Petrie, 128 C.C.C. 311, 316 (1960) Vancouver County Court).

51 Id. at 318 (B.C.C.A.).

in determining what field has been occupied by section 162. This law speaks not to surveillance or invasion of privacy or to any other purpose which the transgressor may intend vis-à-vis the householder, but only to the proscription of any trespass by night. The conclusion must be that the postulated field of privacy has not been occupied by this piece of federal criminal legislation.

(2) Section 273, Criminal Code of Canada.

In 1960-61, the following section was added to the Code:

Theft of Telecommunication Service

273 (1) Every one commits theft who fraudulently, maliciously and without colour of right,

(a) abstracts, consumes or uses electricity or gas or causes it to be wasted or diverted;
or

(b) uses any telecommunication wire or cable or obtains any telecommunication service.

(2) In this section, "telecommunication" means any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire or cable.

This section has not been interpreted in any reported case. It, like section 162, seems to be aimed at the protection of a property interest—in this case, the commercial transaction of the purchase and sale of gas, water, electricity, cable television programmes, and related matters such as wirephotos, telegraphs, telephone service, etc. Whether or not, for example, the interception and overhearing of a telephone call by means of an induction coil (which uses the current of the wire to activate the listening mechanism) would be caught is questionable. It would do no violence to the language of the section to hold that the "service" involved in the telephone business is the transmission of one person's voice to another person, and that overhearing such a transmission would be a "use". But if both the intended listener and the covert listener use the service, the question then becomes whether or not the activity of the latter is fraudulent, malicious and without colour of right. Glanville Williams has written that "fraudulently and without a claim of right" means "belief in a

legal right" to which the addition of "fraudulently" adds nothing.⁵²

It is a readily observable fact that private investigators, for example, believe, and have been held to have,⁵³ and have a statutory right to "search ... for and furnish ... information as to the personal character or actions of a person or the character or kind of business or occupation of a person"⁵⁴ Furthermore, there is nothing in English or Canadian law that defines interference with privacy as a wrong. Given these considerations, it appears that the invasion of privacy that may result in some forms of the theft of telecommunications service is irrelevant to the offence created. The gravamen of section 273 seems to be the use of the service without payment therefor, and if the person who overhears the telephone conversation by means of an induction coil device is punishable, it is not because his activity invades the privacy of the bona fide user, but rather because he is not a subscriber to the service provided or in a contractual relationship with the subscriber or the telephone company. Without considering the provisions of the Bell Telephone Company Tariff, a subscriber who recorded an incoming telephone call with an induction device attached to his telephone could hardly be said to violate section 273. The fact of the matter is that these situations are novel, and are ones in which no concrete jurisprudence exists. Hypothetical cases of all sorts could easily be set up as a socratic exercise in determining how much new wine can be poured into the old bottles. In the writer's opinion, the utility of such an exercise is outweighed by the observation that here, as in section 162, Parliament has not yet addressed itself to the issue of privacy. The result of section 273 may be to afford some protection to privacy, but this is only achieved through the medium of the protection of the economic interests of the telecommunication and utility companies and those who

52 Williams, op. cit. supra note 30, at 322.

53 E.g., Regina v. Andsten and Petrie, 128 C.C.C. 311, 318 (1960) (B.C.C.A.).

54 The Private Investigators and Security Guards Act, 1965, Stat. Ont. c. 102, s.1 (1965).

contract and pay for the use of their services. The result is that section 273 does not pre-empt any legislative field of privacy, although it may in some way affect privacy by punishing conduct which, among other matters, may invade privacy. The situation is similar to the effect of Criminal Code provisions against breaking and entering. The Code protects the householder against certain intrusions, but it has no effect upon his claim to protection under the provincial law of trespass, nor upon the legislative capacity of the province in relation thereto. The major difficulty with this analogy is that both breaking and entering and trespass could claim a conceptual domain prior to 1867, and the devolution of legislative competence in relation thereto was quite clear under the B. N. A. Act. "Privacy" is an unknown quantity, without an historically defined lineage or a legitimate set of legal characteristics of its own. Until these are determined in such a way as to allow the charting of its boundaries, it is a difficult and perhaps speculative exercise to determine whether the rampart has been breached. With this caution in mind, it appears that section 273 does not occupy the field in relation to protection of privacy.

(3) Section 366 (1) (c), (f) and (2), Criminal Code of
Canada.

Intimidation

366 (1) Every person who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do or to do anything that he has a lawful right to abstain from doing,

(c) persistently follows that person from place to place,

(f) besets or watches the dwelling house or place where that person resides, works, carries on business or happens to be,

is guilty of an offence punishable on summary conviction.

(2) A person who attends at or near a dwelling house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

This section is capable of being viewed as protecting the privacy of the person who is being watched, followed or is otherwise under surveillance, so long as the individual or group doing the watching has the necessary intent of exerting the compulsion defined in sub-section (1). The historical antecedents of this law go back to the English Conspiracy and Protection of Property Act of 1875, and it has and does function almost exclusively in the context of trade union activities. It is important therefore, to keep in mind that the argumentative trick of moving words which derive their significance from one context into a different context and subject to different conceptual structures, can make spurious conclusions seem fairly plausible.⁵⁶ As a result, it is the writer's opinion that it is unlikely that a court could be convinced that invasion of privacy by following or watching would be a criminal act under this section if it were outside of the framework of a union-management dispute. Further, the section does not catch surveillance done for any end other than compulsion. Thus, a design to gather information about another person as an end in itself is not made unlawful.⁵⁷ In addition, sub-section (2) seems to specifically exempt the gathering of information from the criminal offence defined in section 366. However, this is a saving clause directed to the preservation of the common law right of communication of information, and the above caveat as to context-switching applies here with equal strength to prevent the conclusion that sub-section (2) gives any air of legitimacy to surveillance that it does not otherwise possess.⁵⁸

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- 56 For an excellent exposition of this theme, which runs through the whole of the occupied field discussion, see Hancock, The Fallacy of the Transplanted Category, 27 Can. Bar Rev. 535 (1959).
- 57 A similar conclusion on the English "watching and besetting" statute was expressed in Peeping Toms in English Law, 231 L. T. 115, 116 (unsigned).
- 58 The writer has found only one case in which "spying" was a factor in a decision under the watching and besetting provisions of the Code; unfortunately the decision is written in French and its evaluation must be left to those who are at ease with that language: Acton Vale Silk Mills Ltd. v. Leveille, (1939) 78 Que. S.C. 19.

The "wrongful and without lawful authority" provision of section 366 has caused the courts to refer back to the common law in order to ascertain when picketing, itself a lawful activity, becomes unlawful. If the conduct charged was tortious at common law, then it is also wrongful within the meaning of the Criminal Code. There are several grounds upon which watching and besetting could be tortious: nuisance, trespass and inducing breach of contract are three examples. Of these three choices, nuisance has been most commonly relied upon as the means for testing the quality of the conduct.⁵⁹

Winfield defines "nuisance" as follows:

[Nuisance] is incapable of exact definition, but for the purposes of the law of tort it may be described as unlawful interference with a person's use or enjoyment of land, or some right over or in connection with it.⁶⁰

We are therefore referred back to the old law of real property, under which "freedom from view and inspection" was not among the rights of the occupier.⁶¹ Several cases can be found that indicate that picketing a dwelling house is a nuisance but these decisions fail to indicate whether this is a function of some right of privacy in the occupier, or the right to be free from rowdy conduct⁶² or the annoyance of relays of men carrying signs.⁶³

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- 59 See, e.g., Renners v. The King, [1926] 3 D.L.R. 669, esp. judgment of Newcombe, J. (Sup. Ct. Can.); Carrothers, Collective Bargaining Law in Canada, 442-43, 447-49 (1965).
- 60 Winfield, Textbook on the Law of Tort, 442 (6th ed. 1954).
- 61 See text accompanying note 47 supra.
- 62 Rex v. Elford, 87 C.C.C. 372 (1947) (Hamilton Magistrate's Court).
- 63 J. Lyons and Sons v. Wilkins, [1899] 1 K.B. 255.

In sum it must be said that this section of the Code, like the others, does not protect privacy per se, and is not intended to deal with problems of invasion of privacy except as they exist as an incidental factor in union-management relationships, especially picketing. It seeks to define "reasonable limits to the pursuit of self interest"⁶⁴ in situations which are inherently volatile and prone to violence. To attempt to remove it from its origins and read into it any federal occupation of the field of privacy would be to attribute a non-existent intention to Parliament. Whatever may be its "pith and substance," if you will, it is not the protection of privacy.

(4) Other Sections of the Criminal Code

(a) Mischief: Section 372

This section is capable of covering certain invasions of privacy since it speaks to the obstruction or interference with the lawful use, enjoyment or operation of property. A telephone tap or an eaves-dropping device in a home or office could logically be construed as "obstruction or interference." However, the history of mischief under this section, and under its constituent sections in earlier versions of the Code, shows fairly conclusively that there must be actual damage to property involved, an intent to damage the property, and that it must be more than slight or inappreciable in nature.⁶⁵ In short, it is a property offence, and has only an incidental relationship to whatever considerations of privacy that may be contained in the use or enjoyment of property.

The section contains a saving clause similar to that in section 366:

372 (7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling house or place for the purpose only of obtaining or communicating information.

64 Carrothers, op. cit. supra note 59 at 430.

65 See the cases collected and discussed in Tremere's Annotated Criminal Code, 596-98 (6th ed. 1964).

This provision was added in Parliament during the debate on the 1955 code. The debates ⁶⁶ are not available to the writer, but it is probable that these words, which represent the classic formula for the protection of lawful trade union activities, are only present to prevent the expansion of mischief to catch activities that are otherwise protected by section 366. ⁶⁷ The same considerations mentioned under the above written discussion of the section 366 saving clause would therefore apply here.

(b) Disobeying a Statute: Section 107

This section of the Criminal Code provides:

Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids ... is, unless some penalty or punishment is expressly provided for by law, guilty of an indictable offence and is liable to imprisonment for two years.

The statute that is of interest here is an Act to Incorporate The Bell Telephone Company of Canada. ⁶⁸ Section 25 of this act reads:

Any person who shall wilfully or maliciously injure, molest or destroy any of the lines, posts, or other material or property of the company or in any way wilfully obstructs or interferes with the working of the said telephone lines, or intercepts any message transmitted thereon, shall be guilty of a misdemeanour.

Without engaging in an extensive quibble over the meaning of "intercept," it appears that these two sections combine to make wire-tapping a criminal offence. However, section 25 as a whole appears to speak to the protection of the economic interests of the Bell Company, and it is logically possible to assert that the intention of Parliament would be

66 Debates in the House of Commons, 1953-54, 3877-80.

67 E.g., as was done in England in the celebrated case of R. v. Manley, [1933] 1 K.B. 529 (C.C.A.). The Manley case was followed in Canada on its facts: Williams, op. cit. supra note 30 at 599. A similar saving clause was added to section 52 (Sabotage): 1953-54 Debates, 3873.

68 Stat. Can. 43 Vict. c.67, s.25 (1880).

accurately stated if the words "without payment therefor" or "without permission" were inserted after the words "transmitted thereon."

It is also logical to say that a person could "intercept a message" even if he acted with full knowledge of both parties to the conversation. In the absence of authorization from the Bell Company, this would be interception vis-à-vis the company, but not an invasion of anyone's privacy. Following this line of reasoning, it could be argued that if Parliament was regulating the activity of interception for the purpose of protecting the Company's works from unauthorized use or against interference or damage, then a province could also regulate the activity of interception for the purpose of protecting some general right of privacy in the province. As Laskin has pointed out, "there is no constitutional prohibition against exposure to double liability for the same act or conduct, ie., under both federal and provincial legislation" ⁶⁹ Thus a province may validly prohibit possession of liquor not purchased from a provincial liquor board, and the federal government may validly prohibit possession of unlawfully manufactured liquor. Both enactments are constitutionally sound and a person who commits only one act of possession may be tried therefore under both the provincial and federal statutes. ⁷⁰

Further, it is probably a safe assumption to make that until Warren and Brandeis wrote their famous article in the 1890 Harvard Law Review, ⁷¹ the idea of a right of privacy inhering in the person, divorced from all questions of property or "special property," or contract was not present to the mind of any common law legislative body.

69 Laskin, Canadian Constitutional Law, 98 (2d ed. 1960).

70 Rex v. Kissick, 78 C.C.C. 34 (1942) (Man. C.A.); see also Couture v. Lauzon School Commissioners, 97 C.C.C. 218 (1950) (Que. Ct. Sess.).

71 Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

There is, of course, no authoritative answer to the question of whether the Bell Telephone Act speaks to privacy or to the protection against interference with a new and unexplored type of commercial venture. The mischief aimed at could be either of these, or both. Giving the words their plain meaning makes the act of interception of communications a crime. If the statutory interpreter puts "himself in the position of those whose words he is interpreting," ⁷² then it is more likely than not that privacy, as an aspect of legislation, was not dealt with by Parliament in this statute, even though the act by which it is possible to invade such privacy as exists in telephonic communications was proscribed in 1880.

If the Bell Telephone Act is interpreted as being intended to encompass the aspect of privacy, then provincial legislation attaching penal sanctions to the interception of telephonic communications would probably be ultra vires. This assumes that the protection of privacy in telephonic communications is "truly ancillary" to valid federal telephone legislation. If so, then provincial legislation for the protection of privacy, insofar as it relates to interception of telephone conversations, would be overlapping in a field that is not clear, and the federal legislation would prevail. This would be true even if the provincial legislation were clearly within the boundaries of civil rights. ⁷³ In today's society common sense indicates that new ad hoc legislation by Parliament to protect the confidentiality of telephonic communication would almost certainly be considered as valid ancillary telephone legislation, as well as valid criminal law. Whether the Bell Telephone Act of 1880 would be viewed as already accomplishing the protection of privacy, if comprehensive provincial legislation to this end were enacted, is a different question. Were the issue to arise on appeal from a conviction under such a hypothetical

72 The test adopted by the Supreme Court in Re Branch Lines; C.P.R. v. James Bay Ry., (1905) 36 S.C.R. 42.

73 The considerations in this paragraph stem from the constitutional tests enunciated in Grand Trunk Ry. v. Attorney-General for Canada, [1907] A.C. 65 (P.C. Can.).

provincial act, in which the appellant sought to avoid liability because of federal occupation of the field, there is an excellent chance, in the writer's opinion, that the provincial legislation would stand. There has never been a prosecution under section 25 of the Bell Telephone Act for the interception of messages.⁷⁴ For a court to declare that its unknown reach would prevent the implementation of a major portion of general provincial legislation protecting all aspects of personal, commercial and organizational privacy strikes the writer as an unlikely eventuality, even though this conclusion is based upon extra-legal considerations. Were the situation reversed, and the issue raised in a prosecution under section 107 of the Criminal Code for violation of the Bell Telephone Act, the appeal could fail without ever reaching the germane constitutional question. If the accused were proved to have intercepted a message, it could not be argued that provincial legislation prohibiting the same act could invalidate the federal law. The constitutional issue that is of concern is not whether the prevention of interception of telephone messages is valid ancillary telephone legislation, which it almost certainly is, but rather whether federal legislation preventing such interception extends to the purpose of protecting the privacy of the person using the telephone -- a matter which would not be relevant to a prosecution for the act of intercepting of a message. A constitutional reference could, of course, settle the matter, and in such a case the writer feels that, as in an appeal from a conviction under a provincial privacy statute, there is a greater likelihood of comprehensive provincial statutory provisions that are rooted in protection of privacy being held to be intra vires, even though they impose sanctions for the interception of telephonic communications, than there is of the court finding that the meaning of section 25 of the Bell Telephone Act precludes such provincial legislation.

74 Report of the Ontario Police Commission on Organized Crime,
94 (1964).

Before leaving this area, it should be pointed out that section 107 of the Criminal Code refers only to statutes of Parliament and not to regulations made thereunder.⁷⁵ Therefore, any violation of the more elaborate provisions dealing with recording devices attached to telephones that are found in the Bell Telephone Company General Tariff⁷⁶ cannot be made the subject of a criminal prosecution.

B. Other Federal Legislation

(1) Statistics Act⁷⁷

This statute contains four sections dealing with privacy — or more accurately, with non-disclosure of information obtained under its authority. Section 6 provides an oath to be taken by persons who have duties under the act which binds such persons not to disclose "any matter or thing which comes to my knowledge by reason of my employment" without "due authority." Due authority presumably means the authority of the Minister of Trade and Commerce, although the criteria for the exercise of his authority are nowhere spelled out.

Section 15 forbids disclosure of individual returns or answers without consent of the person in relation to whom the return was made, and forbids publication of general statistical information that can be traced to any individual person or business.

Section 39 provides a fine and imprisonment for wilful disclosure of information obtained under the act to "any person not entitled" to receive it, so long as the information might influence or affect the market value of any product and for use of such information for the purpose of speculation in any product.

75 R. v. Singer, [1941] S.C.R. 111.

76 Canadian Transport Comm. Reg. No. 6716, especially Rule 9, Item 485, and Item 2260.

77 R.S.C. c.257 (1952).

Section 34 provides a lesser fine and imprisonment for failure "to keep inviolate the secrecy of the information gathered" or for unauthorized disclosure of such information.

The Statistics Act, in sum, does not speak to any general right of privacy, but does protect the privacy of persons and organizations to the extent that it forbids unauthorized disclosure of information gathered for the purposes and under the authority of the act. Any provincial legislation making invasion of privacy a statutory offence would not catch such disclosures; but the Statistics Act would not otherwise render general provincial legislation inoperative.

(2) Radio Act⁷⁸

Radio broadcasting and receiving, in a very wide sense of these words, is under the exclusive jurisdiction of Parliament.⁷⁹ The subject is of dual significance to this report. First, there is federal jurisdiction over the area of confidentiality and authorized disclosure of data and information transmitted by any means of radioelectric communication. Second, most, but not all of the technical devices available for surreptitious invasion of privacy rely upon some radio links or apparatus for their operation. To the extent that this is so, the federal government has, at least in theory, exclusive jurisdiction over their use and to prescribe regulations in relation thereto.

The primary means of control over the use of radio apparatus under the scheme of the Radio Act is a licence in some form or another. The act provides that, except as specified in the regulations, no person shall establish a radio station or install, operate or have in his possession any appliances capable of being used as a radio station, without

78 R. S. C. c. 233 (1952) as amended by S. C. c. 48 (1952-53), S. C. c. 57 (1955), and the Broadcasting Act, 1968, Part IV (not bound as of this date).

79 I.e., federal jurisdiction would extend to such things as television, radio-magnetic alarm systems, remote garage door opening devices, neon signs that create electrical interference conditions on radios, etc.

the authority of and in accordance with a federal licence.⁸⁰ The only exception in the statute is the "private receiving station," which is the ordinary parlor radio or television set. The regulations provide several other exemptions, which will be considered later.

Confidentiality of radio communications is established in two ways. First, the regulations establish some thirty-odd different classes of licences,⁸¹ carefully defined according to service or function, power output, nationality and nature of the licensee and allocated portion of the radiomagnetic spectrum. Each licensee, generally speaking, may only do those things that are authorized by his particular licence. Second, the Radio Act, section 8 (2) provides:

Except as provided in the regulations made by the Minister under this Act or in the Regulations made under the Canada Shipping Act, every person who, having become acquainted with any radio communication transmitted otherwise than by a broadcasting undertaking, makes use of such communication or divulges it to any person is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five hundred dollars or to imprisonment for a term of not exceeding twelve months or to both fine and imprisonment.⁸²

The regulations provide certain exemptions from this section, which may briefly be stated as disclosure to a court or a departmental official, disclosure of amateur or "all stations" transmissions, or disclosure as authorized by the sender, or such disclosure as is necessarily required to function under the conditions of the licence, or in any distress situation.⁸³

80 The Broadcasting Act, 1968, s.48. "Radio Station" means all forms of transmission and reception equipment.

81 General Radio Regulations, Part II, S.O.R. 63/297. The classes of licences are shown in regulation 7. The restrictions on each class are scattered through the entire 51 pages of Part II.

82 The Broadcasting Act, 1968, s.52. A "broadcasting undertaking" is ordinary commercial broadcasting of news, entertainment, music, etc.

83 Regulation 35, S.O.R. 63/297.

In sum, the Radio Act has created a fairly comprehensive scheme for the safeguarding of radio communications against what may be styled "disclosure pursuant to eavesdropping by radio on radio transmissions," either by radio operators or by anyone else. However it is not so clear as to whether these provisions would cover the use of the radio to eavesdrop on communications that are not intended to be transmitted by radio — i.e., the overhearing of a conversation that is picked up by a concealed radio transmitter and broadcast for a short distance to a receiving set with earphones or tape recorder attached. The Radio Act and its Regulations are not designed to prevent per se the surreptitious invasion of privacy through the use of radio apparatus. If they achieve this end, it would only be because no federal license could be interpreted as covering the type of station or type of service or function or electronic parameters of, e.g., the concealed F.M. transmitter, and it therefore cannot be licensed, or because the regulations don't exempt the use of radio eavesdrop devices from the general ban on disclosure of transmissions that was set out above.

The point should be made that there are no general or specific provisions against overhearing transmissions made by radio, but only against unauthorized disclosure. The type of transmissions that may properly be listened to can only be implied by the conditions of the license and the purpose or service for which it has been issued. For example, the privacy of armed forces calls is protected by not licensing other than military stations to operate on the assigned armed forces wave-lengths, and by not licensing other than military stations to serve the function of recipients or transmitters of armed forces messages. Parliament doubtless could make an unauthorized overhearing of a radio transmission a breach of a valid statute, as well as an unauthorized disclosure. For practical purposes one could say that radio eavesdropping on intended radio transmissions is not only an occupied federal field, but is also fairly well regulated at present. Although further control over overhearing of such transmissions might be desirable from the point of view of strict privacy,

this would not only prove to be difficult to enforce, but would also be at odds with the very nature of most radio communication.

The aspect of the control of the use of radio apparatus to eavesdrop on conversations that are not knowingly intended for radio transmission is, theoretically, well within the federal field.⁸⁴ This subject has two major considerations: federal protection of privacy of non-intentional radio transmissions against disclosure to third parties and federal protection of non-intentional radio transmissions against overhearing without disclosure by an eavesdropper operating a receiving apparatus. It is impossible for the writer to determine the extent to which existing radio regulations occupy this aspect of the privacy field (i.e. the unintentional transmission) for several reasons. First, certain types of radio apparatus are exempted from the licensing requirement, depending upon their frequency bands and use in conjunction with, e.g., a public address system or a private receiving station.⁸⁵ It is conceivable that wireless "bugs" are constructed so as to fall outside the licensing requirements. This fact is not within the writer's knowledge. Second, the writer does not know the minister's policy as to whether devices capable of being used as surreptitious radio eavesdrop devices are given valid licenses, in which case it would become determinative to know the classification of the license granted. These two unknowns prevent the drawing of any conclusions as to whether the exemptions from the nondisclosure provisions of the Radio Act⁸⁶ would include either devices not required to be licensed or licensed devices of a certain class. Any person may divulge a transmission "as may be necessary for the conduct of the business of any communication station or system through which such communication is transmitted or received"⁸⁷ If a no-license "bug"

84 Parliament has, as a function of its exclusive jurisdiction over radio, the right to determine the "character, use and location of radio apparatus employed." In re the Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, 310.

85 See regulation 6, S.O.R. 63/297.

86 Listed in regulation 35, S.O.R. 63/297.

87. Id., subsection (a) (ii).

were constructed, then there is no particular licensed service or function to which it must conform. The "business" of the system would be eavesdrop, and there would be no prohibition against disclosure of that which is overheard. Again, if such devices are licensed, then the same exemption may grant positive authority to disclose. Another blanket exemption would apply if such licenses were construed as authorizing "amateur transmissions," for which no nondisclosure provisions exist.⁸⁸

If certain devices or services are exempted from the non-disclosure provisions of the act or regulations, either because of the scope of their license or because they are not required to be licensed, then a fortiori, they are not subject to controls as to what transmissions they may overhear. What may be overheard is a function of the license, and is not related to what may be disclosed. If no license is required, presumably anything on the non-licensed frequency or system, including a conversation not intended to be broadcast by the speakers, may be lawfully transmitted, received, and overheard. If a license is required and permitted for a "bug" system, then the operator would have positive authority to overhear such conversations, as well as to disclose them in accordance with the disclosure regulations and exemptions.

To this extent and for these purposes then, it is impossible to say how far the existing regulations reach.

It is a difficult matter to determine the theoretical limitations on how far the province could go in regulating the use of radio eavesdrop devices even if the field is not occupied. The regulations contain only one reference to provincial jurisdiction. Under the heading "General Radio Service," which is one of the thirty - odd classes of licenses, the regulations read:

A licensed station shall not be used for any of the following purposes:

- (a) activity contrary to federal or provincial law or municipal by-laws⁸⁹

88 Id., subsection (b) (i).

89 Regulation 74 (2) (a), S.O.R. 63/297.

"General Radio Service" means "a service provided by land or mobile stations for personal or private business radiotelephone communications in the frequency band 27.00-27.23 Mc/s"⁹⁰ Since telephones are in some cases subject to provincial regulation (i.e., the municipal system), the substance of the cited regulation may be that the possession of a General Radio Service License does not prevent the operation of provincial laws that are valid controls over provincial telephone systems, when the radiotelephone is used in connection therewith.

Several logical positions are tenable on jurisdictional questions. One is that no federal license can authorize the licensee to disregard valid provincial laws.⁹¹ Another is that no provincial law is valid if it encroaches on an area of exclusive federal jurisdiction — in this case, provincial regulation of the use of radio apparatus to prevent the commission of the provincial statutory offence of the invasion of privacy. A third is that the theoretically unitary field of "radio" has aspects, just as do almost all other conceivable ideas or concepts. For example, neon tubing can create radio interference. For the purpose of regulating the suppression or control of radio interference, the sale of neon tubing is under federal jurisdiction.⁹² However, if interference suppressive devices of a suitable nature are incorporated into neon tubing, its sale is authorized by the federal law, and the conditions and contract of sale, the devolution of property therein, its use, and most other legal and social consequences that follow from its purchase are then governed by provincial law. Of these three possibilities, the third or aspect doctrine seems to the writer to be the most "constitutionally reasonable," and the avenue which further investigation should therefore pursue.

90 Regulation 2 (i) (vi), S.O.R. 63/297.

91 This becomes decreasingly valid in inverse proportion to the content that is read into the field of federal jurisdiction. See Johannesson v. West St. Paul, [1952] 1 S.C.R. 292.

92 Regulations 18-23, General Radio Regulations, Part I, S.O.R. 63/296.

Federal jurisdiction over radio is based in part upon the residual power and in part upon section 92 (10) (a) of the B.N.A. Act.⁹³ In the Johannesson case, Rinfret, C.J.C., observed that where a subject matter of legislation falls under the residual power, no federal occupation of the field is necessary to prevent provincial legislation — in other words, residual powers do not overlap any provincial field and cannot have provincial aspects.⁹⁴

This narrows the issue as to how far the protection of the privacy of conversations that are not intended to be broadcast, but which may be surreptitiously broadcast by a concealed radio apparatus, is a legitimate function of "radio legislation" as an abstract or theoretical proposition.

The academic's answer, in view of the Radio and the Johannesson cases, must be that Parliament has the power to legislate to prevent the broadcasting of a person's voice without his knowledge or consent, and that this would be proper "radio legislation." If this is so, then the province may not enact such a law, even in the absence of federal legislation. However, conceptualism is not always the master of our destiny, and the intrusion of common sense is not an unknown characteristic of our laws. In theory, Parliament could (and at one time did) license the parlor radio. Applying the test in Public Utilities Commission v. Victoria Cablevision Ltd. (the only significant interpretation of the federal radio power since 1932), a province could not pass noise abatement laws to control parlor radios since a provincial legislature cannot "restrict the right conferred by the dominion."⁹⁵

93 So held in the Radio Reference case [1932] A.C. 304. As rationalized in the Labour Conventions case, "broadcasting" is under section 92 (10) and everything else pertaining to radio is under the residual power. See [1937] A.C. 326, 350-51.

94 See Johannesson v. West St. Paul, [1952] 1 S.C.R. 292, 303.

95 Public Utilities Commission v. Victoria Cablevision Ltd., (1965) 52 W.W.R. 286, 290 (B.C.C.A.).

This absurdity could be defended in theory by reference to the exclusive federal power to control the "use" of radio apparatus, as decided in the Radio case, and by the dictum of Rinfret, C.J.C., in the Johannesson case that federal legislative authority under the residual power does not overlap provincial jurisdiction, but rather, ousts it. As a practical matter, however, the Constitution does not work this way, and theoretical blacks and whites merge and shift into grays when they are placed in different contexts for different reasons. Consider this section of the Alberta Game Act:

No person shall hunt from, or at any time carry a loaded firearm in, or on, or discharge the same from, an aeroplane⁹⁶

Is this ultra vires because it restricts a federal right or because it overlaps into a residual federal jurisdiction where provincial enactments automatically fail? The theoretical problem is the same as occurred in Johannesson. The practical answer, it is submitted, would be very different. If our constitutional tests would suffer the existence of such game legislation vis-à-vis federal aviation power, then it seems to the writer that they will equally accommodate the existence of carefully drafted provincial legislation to protect a general right of privacy, including the invasion of such a right by broadcasting conversations without the knowledge and consent of the speakers.

Several tentative conclusions may be reached:

1. The protection of confidentiality of intentional transmissions via radio apparatus is an occupied and regulated federal field. No further action by Parliament is necessary or especially desirable, and no action by the province is possible. Protection is afforded both by nondisclosure and licensing requirements under the Radio Act and its regulations.
2. No federal legislation or regulation protects the privacy of conversations not intended to be transmitted by radio against invasion by covert transmission.
3. It is not known whether systems capable of covert transmission can lawfully escape licensing requirements and their attendant use restrictions by some combination of exempted functions and apparatus. This needs to be examined by someone familiar with the electronic parameters of covert systems in light of the technical exemptions in the regulations.

⁹⁶ Game Act, R.S.A. c.126, S.10 (1) (1955). An even more restrictive provision appears in Ontario: "Aircraft shall not be used in connection with hunting operations except as a means of transportation between a settlement or base of operations and a hunting camp" R.S.O. c.158 s.59 (1960).

4. It is not known whether the policy of the minister allows the licensing of systems capable of or designed for covert transmission under some licensing head such as "Amateur Experimental Service." If so, this would be tantamount to a federal license to eavesdrop, and may pose serious constitutional difficulties for provincial regulation.
5. Federal licensing regulations on their face contain no prohibition against the use of a licensed transmission and receiving system to broadcast a conversation not intended for radio transmission by the speakers. The obvious reason is that this was not in anyone's mind when the regulations were drafted.
6. The Radio Act prohibits installation, operation or possession of unlicensed radio apparatus. The licenses regulate the use and operation of radio apparatus for "radio" purposes. While such licenses may be exhaustive for such purposes, there may still be as much room for provincial regulation of radio apparatus for "non-radio" purposes (i.e., the invasion of privacy) as exists for provincial regulation of aeroplanes for "non-aeronautics" purposes (i.e., the protection of game from hunting by aeroplane).⁹⁷
7. The most effective provincial controls would probably be those that regulated such matters as operation use or possession of radio systems designed for or capable of covert transmission. The simplest answer would be new federal law, or a new federal regulation incorporating provincial laws by reference, as presently exists under the General Radio Service Regulations.
8. Failing federal cooperation, provincial laws stand the best chance of being within provincial jurisdiction if they are premised upon the protection of privacy of conversations against unauthorized or unintended overhearing by any means of covert eavesdrop, rather than upon the control of the operation, use, or possession of radio apparatus that is designed to be used or capable of being used for such purposes.
9. Generally, privacy as a legislative field is no more occupied by the Radio Act than by any of the other instances of federal legislation discussed so far — i.e. only incidentally and in pursuit of federal ends. The constitutional problem that is of concern is how close to the federal domain the province will come should it attempt to regulate, in the name of privacy, the use of the radio apparatus that poses one of the very major threats to privacy.

(3) Telegraphs Act⁹⁸

This statute contains four sections that protect the confidentiality of communications.⁹⁹ These sections apply only to employees of the

97 Since the provincial game acts may themselves be ultra vires when they attempt to regulate this use of aeroplanes, this example begs the constitutional question. However, to the extent that a very good argument can be made as to their validity, they offer some precedent for attempting the same approach to privacy legislation. There is no doubt that they are honest provincial attempts to protect game in the province. But c.f. the Quebec Broadcasting Act, S.Q. c.56 (1945), which is almost a carbon copy of the former Federal Broadcasting Act, and which is almost certainly beyond provincial powers.

98 R.S.C. c.262, (1952).

99 Id., sections 2-6.

telegraph companies, and refer only to information gained in the course of employment. They prohibit the disclosure of information, but not the acquisition of information. Thus, eavesdropping on or interception of telegraphic communications is not covered by the statute, nor is disclosure of any such communication by a non-employee prohibited by federal law. Certain employees are required to make a declaration of secrecy, which appears to be directed to the non-disclosure of "matters of state,"¹⁰⁰ and all employees, whether or not they are required to make this declaration, are subject to a general prohibition against divulging the contents of any telegram.¹⁰¹

The conclusion must be that there is no general protection of privacy of telegraphic communications.

No regulations pertaining to the subject matter of this report have been made under this act.

(4) Railway Act¹⁰²

This act authorizes a railway company to "construct and operate telegraph and telephone lines upon its railway for the purposes of its undertaking."¹⁰³ There are no provisions in this act concerning the confidentiality or disclosure of communications made over railway telephone and telegraph systems. Part II of the Telegraphs Act applies to the telegraphic business of the railway company,¹⁰⁴ but the non-disclosure and secrecy provisions referred to in the above discussion of the Telegraphs Act are contained in Part I thereof. The provisions of an Act to Incorporate the Bell Telephone Company of Canada relating to interception of telephone

100 Id., section 3, Schedule.

101 Id., section 6.

102 R.S.C. c.234 (1952). The powers to make regulations conferred on the Board of Transport Commissioners under section 34 of this act have been passed to the Canadian Transportation Commissioners under the National Transportation Act, S.C. c.69 (1966-67).

103 R.S.C. c.234, s.372 (1952)

104 Id., s.372(3).

messages¹⁰⁵ are not made applicable to the telephone systems of the railway companies. Section 380(13) of the Railway Act¹⁰⁶ extends offenses against this act to the Bell Telephone Company, but offenses against the Bell Telephone Act are not made offenses against the Railway Act. Thus the Bell Telephone Act remains the only federal statute that touches upon the interception of telephone messages.¹⁰⁷

The regulations under the Railway Act may contain provisions as to secrecy and non-disclosure of telephone and telegraph communications. These regulations are not required to be published and were not available to the writer. They may be obtained from the Canadian Transport Commission, and should be checked.

(5) An Act to Incorporate the Bell Telephone Company of Canada¹⁰⁸

The applicable section of this statute has been fully discussed in the above analysis of section 107 of the Criminal Code. This part of the report will deal only with certain germane regulations made under this statute, taken from the General Tariff of the Bell Telephone Company.¹⁰⁹ The basic control is established in Rule 9:

The Company's equipment and wiring shall not be rearranged, disconnected, removed or otherwise interfered with, nor shall any equipment, apparatus, circuit or device which is not provided by the Company be connected with, attached to, or used so as to operate in conjunction with the Company's equipment in any way, whether physically, by induction or otherwise, except where specified in the Tariffs of the Company or by special agreement. In the event of a breach of this rule, the Company may rectify any prohibited arrangement or suspend and/or terminate the service as provided in Rule 35.

105 S.C. c.67, s.25 (1880).

106 Re-enacted, S.C. c.69, s.67(2) (1966-67).

107 This is of importance in relation to the possibility of a prosecution under section 107 of the Criminal Code for a violation of section 25 of the Bell Telephone Act. If the Railway Act prescribed a penalty for a breach of the Bell Telephone Act, then no prosecution would be possible under section 107. See Tremear's Annotated Criminal Code, 162 (6th ed. 1964). However, this is not the case, and such a prosecution appears to be a valid possibility.

108 S.C. c.67 (1880).

109 Entitled in the Tariff: "C.T.C. No.6716." The Tariff items discussed in the text are appended to this report as Annex A.

This rule appears to the writer to prohibit the use of all standard types of telephone wiretap equipment: the F.M. transmitter which draws its power from a physical or inductive connection with telephone lines, the inductive or external pickup which is powered by the telephone's magnetic field, the infinity transmitter which is installed in the handset and activated by a signal over the telephone line, and the physical tap.¹¹⁰ The important thing about Rule 9 is that the only sanction for its breach is suspension or termination of the telephone service. The writer was unable to find any other sanction in the General Tariff, although this does not eliminate the possibility that one exists. The Tariff is a large two-volume document. In addition, the unpublished regulations of the Canadian Transport Commission may provide general sanctions for breach of Commission regulations. This is a matter of no small significance, since any provincial sanctions for wiretapping that duplicated federal sanctions attached to essentially the same act would create a strong inference that the provincial law was ultra vires. The Alberta Slot Machines Act fell largely upon this same ground.¹¹¹

Two tariff items set out what recording devices may be used with telephone equipment. One allows the use of recorder equipment provided by the customer, so long as an automatic "beep" tone device is provided by the telephone company.¹¹² The other item allows the attachment of "non-beep" recording equipment for the internal use of one customer.¹¹³ Presumably this allows, e.g., a corporation to record all telephone conversations among its employees, but does not allow the recording of conversations between an employee and a person talking from a telephone that is not assigned to the corporation.

110 Examples of the standard wiretap systems listed by J.S. Kyles of the Bell Telephone Company in an interview with the Ontario Law Reform Commission, 4 Dec., 1967, pp.4-9. A fifth method of telephonic eavesdrop is, of course, the extension telephone. No regulations deal with its use for this purpose.

111 See Johnson v. Attorney-General for Alberta, [1954] S.C.R. 127, esp. judgment of Rand, J.

112 C.T.C. 6716, Item 2260.

113 C.T.C. 6716, Item 485.3.

The regulations, then, create no general right of privacy for telephone communications. They prevent the use of most equipment that is capable of invading privacy, but it is not clear whether the mischief aimed at is physical protection of the company's equipment, protecting the company against, e.g., unauthorized toll calls or other fraudulent (vis-à-vis the company) use of its system,¹¹⁴ or the protection of privacy qua privacy. Rule 9 is capable of covering these three dissimilar situations. Overhearing a conversation through an extension telephone or at a switchboard is not proscribed by the regulations, although this may be unlawful under section 25 of the Bell Telephone Act.

The "no recording" provisions of the regulations stand in the same relationship to invasion of privacy as the prohibition of possession of housebreaking instruments stands to theft: they are not strictly relevant to the thing being protected, although the prohibition makes the protection more effective. Recording devices do not themselves invade privacy, but only make the invasion more convenient for the eavesdropper, who is freed from the chore of constant attendance. They also provide a more accurate means of disclosing, or proving to third parties at a later date, what was said.

The result is that the regulations do not speak directly to privacy at all, but only stand for federal activity in relation to some, but not all of the ways in which the privacy of telephone communications can be more conveniently invaded and their contents disclosed. Aside from the observations made under the section 107 discussion above, there has been no federal occupation of the field of privacy in relation to telephonic communications, and provincial legislation could probably protect this aspect of privacy, so long as it speaks to "privacy" and not to "federal telephones."

It should be pointed out that these observations, together with any constitutional limitations that may exist, apply only to the Bell

114 Mr. Kyles, supra note 110 at p.2, seems to indicate that this is the function of the Bell Telephone Company's Security Department.

Telephone system, which is a creature of federal law. Ontario, like all other provinces, has a Municipal telephone system interconnected with the Bell system, which is under its provincial legislative jurisdiction.¹¹⁵ For the Ontario system, the province could not only protect the confidentiality of telephonic communications as a matter of a general right to privacy, but also could impose more elaborate and perhaps more useful controls over the use of wiretap devices in connection with this system, as a matter of provincial telephone legislation, than it could in relation to the federal system. Manitoba has an excellent law that protects the privacy of the Bell system, but which is clearly provincial telephone legislation. More of this will be said in Part Three of this report.

(6) Trade Marks Act¹¹⁶

Section 7 of this statute provides:

No person shall... (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

This section could be used for the protection of commercial privacy against that which is commonly known as "industrial espionage." The statute creates a statutory cause of action, and provides for injunctive relief and for recovery of lost profits.¹¹⁷ An Ontario High Court decision in 1961 held that a subsequent unauthorized use of technical data, disclosed to the defendant during licensing negotiations which produced no agreement, was an act contrary to honest industrial or commercial use in Canada.¹¹⁸ This would seem, a fortiori, to proscribe the obtaining of commercial intelligence by surreptitious means. However in 1966 the Ontario Court of Appeal checked the possible expansion of the act in this direction when it held that the words in

115 The Telephone Act, R.S.O. c.394, (1960). The writer does not know the relative proportions of the Ontario system and the Bell system.

116 S.C. c.49 (1952-53).

117 Id., section 52.

118 Breeze Corporation v. Hamilton Clamp and Stampings, Ltd. (1962) 30 D.L.R. (2d) 685 (Ont. H.C.).

section 7 (e) must be read ejusdem generis with the preceeding subsections, which deal with product simulation and passing off, and were not "intended to yield to a subjective or unknown standard embraced in the words 'any other business practice contrary to honest industrial or commercial usage in Canada'...."¹¹⁹

It must be recognized that this section of the Trade Marks Act could still be extended by a court to cover industrial espionage. But, given its interpretation by the Ontario Court of Appeal, it cannot presently be said to be a federal incursion into the field of commercial privacy of any significant dimensions. It is extremely unlikely, in the view of the writer, that it creates any constitutional problems in relation to provincial control over industrial espionage.

C. Conclusions re federal occupation of the privacy field

Parliament has passed many statutes, the most significant of which are set out above, that protect one or more aspects of privacy or control one or more of the means by which privacy can be invaded. None of these is grounded in any view of privacy as a unified conceptual domain, and most of the statutory provisions that are of interest to this report protect privacy in an incidental fashion, pursuant to the regulation of other economic and social interests that lie within federal jurisdiction.

If privacy is to be such a unified domain, then the task of creating and defining it lies in the future. The closest historical antecedent of this postulated field lies in common law eavesdropping — an ill-defined form of anti-social activity with ill-defined measures of control, and which cannot be equated in any meaningful fashion with the modern problem of invasion of privacy.

If a province created a protected zone of privacy, it would be well within its constitutional jurisdiction in most areas. There could be

¹¹⁹ Eldon Industries Inc. v. Reliable Toy Co. Ltd., (1966) 54 D.L.R.(2d) 97, 108 (Ont. C.A.).

overlaps in some places, but most of these can be avoided by careful draftsmanship. Where overlaps are unavoidable, the provincial and federal enactments may still be capable of co-existing so long as they can be said to both regulate the same activity for different reasons and for the accomplishment of different social ends. The greatest potential conflict lies in the fields of radio and telephones, primarily because the physical instruments associated with these abstractions are presently subjected to a considerable amount of federal legislation. Where privacy can best be protected by control of apparatus that falls under or is closely associated with the heads of radio and telephones, then federal legislation would probably be necessary as well as desirable. As long as provincial legislation remains tied to privacy qua privacy and avoids the attempt to protect it by attaching conditions to the use of mechanisms or systems that are per se under federal jurisdiction, then effective controls can be established without bringing provincial laws into an occupied federal field in which there must necessarily be a potential conflict. The field of privacy must be defined so as to avoid intrusions into federal jurisdictional areas where possible, and where this is not possible, then the purpose for which the intrusion is made must be clearly different from the purpose for which the federal law exists.

Suggestions as to the direction in which further inquiry should go in order to accomplish this end will be made later in this report. It is sufficient at this juncture to state that there is plenty of constitutional room for provincial legislation making invasion of privacy a statutory offence.

PART THREE: RELEVANT PROVINCIAL LEGISLATION

I. General observations

Like the federal legislation discussed above, no Ontario statutes, and no statutes of any other province, with the exception of British Columbia,¹²⁰ deal directly with or relate to privacy as an end in itself. What protections exist, and what invasions of privacy are authorized, are, generally speaking, contained in the interstices of legislation directed to other purposes. This section of the report will deal first with salient Ontario legislation and then with a few of the many statutes that have been enacted by some of the other provinces that are of importance to the topic of this report.

II. Ontario legislation

A. Telephone Act¹²¹

This statute forms the basis for the exercise of provincial jurisdiction over the municipal telephone systems in Ontario. The writer can do no more than define these as all telephone systems in the province that are not under the jurisdiction of the federal government as part of the works and undertakings of the Bell Telephone System.¹²² The Ontario Telephone Act contains two sections that are of interest. One creates an offence for interfering with any telephone equipment or wiring "so as to injure or damage it or prevent the proper use of the circuit."¹²³ This may proscribe the use of wiretaps in the fortuitious event that their attachment should injure the equipment, or if wiretaps were viewed as preventing the proper use of the circuit. Most wiretaps do neither,¹²⁴ although they may themselves be an improper use of the circuit.

120 An Act for the Protection of Personal Privacy. The 1968 Statutes of British Columbia have not been published as of the date of this report. This statute will be discussed infra.

121 R.S.O. c.394 (1960). The sections referred to in the text are appended to this report as Annex B.

122 The works of the Bell Telephone Company were declared to be works for the general advantage of Canada by the federal Act of 17 May, 1882, 45 Vict. c.95.

123 R.S.O. c.394, s.110(1) (1960).

124 The "infinity transmitter," which turns the handset into a microphone, does interfere with the proper use of the circuit by putting the telephone out of order. See Kyles, supra note 110 at p. 7-8.

The other section that concerns privacy makes it an offence to divulge the purport or substance of any message or conversation that was not addressed to or intended for the person making the disclosure.¹²⁵ This section does not apply to the acquisition of information. Generally speaking, the privacy provisions of this statute are inadequate and poorly drafted.

The Telephone Act contains a third section that is of interest, but for a different reason. It creates an offence for using obscene or blasphemous or grossly insulting language over a telephone line "whether the telephone instrument or line is owned by a telephone system under the jurisdiction of the Legislature or not...."¹²⁶ Vis-à-vis the Bell system, this cannot be "telephone legislation," but rather creates a provincial offence out of conduct that can only occur through the use of a telephone. Without going into an extended discussion of its constitutionality when the language is confined exclusively to the Bell system, it appears the legislature was at one time convinced that it could control this use of any telephone system by starting from some valid provincial premise. If this aspect of telephone use is within provincial jurisdiction, then so may be control of wiretapping and other forms of telephone eavesdropping, built upon a provincial right to privacy, with the minor control over the use of the federal telephone system that this entails being only an incident of the exercise of section 92 powers.

B. Summary Convictions Act¹²⁷

This statute serves a privacy protecting function in that it sets down a procedure to control the exercise of the search and seizure powers of the police in relation to provincial offences, in the same manner as does section 429 of the Criminal Code in relation to criminal offences.

¹²⁵ R.S.O. c.394, s.112 (1960).

¹²⁶ Id., s.113

¹²⁷ R.S.O. c.387 (1960). Relevant portions of this act are appended to this report as Annex C.

One of the suggestions most often put forward for the protection of privacy is the idea that police activity relating to wiretap or the planting of concealed electronic eavesdrop devices should be controlled by search warrants. This raises several interesting problems and questions.

First, a search warrant is designed to allow seizure of evidence that is believed to be already in existence, which will tend to prove the commission of an offence. The wiretap or eavesdrop device is typically used for securing evidence that will come into being at some future time. The present form and theory of the search warrant are inadequate for this purpose.¹²⁸

Second, a search warrant designed to authorize, e.g., wiretapping, would not necessarily inhibit unauthorized police wiretapping in the present state of the rules of evidence, whereunder anything that is relevant is generally admissible.¹²⁹ Thus a wiretap search warrant requirement would only impose a moral restraint on police activity, whereas effective controls can only be imposed through legal restraints that are meaningful in terms of police functional values — such as making wiretap evidence obtained without the proper warrant inadmissible.

Third, speaking solely of provincial offences, which are the only ones within the purview of the Summary Convictions Act, are there any offences for which surreptitious invasion of privacy through wiretap or electronic eavesdrop should be authorized? As was said in the Inquiry into

128 See Re the Bell Telephone Company of Canada, [1947] O.W.N. 651 (Ont.H.C.). There the police were denied their request for a search warrant to install a "pen register" on Bell property, attached to the telephone wires of a suspected betting house. The device would have shown the telephone number that was called to record the bets. This case deals only with the use of the search warrant as giving a right to tap, and has been evaded by the police. They now can do indirectly that which they cannot do directly by the device of entering the premises pursuant to a valid warrant issued for a different purpose, and attaching a recording device while they are there. See R.v. Steinberg, [1967] 3 C.C.C. 48 (Ont. C.A.); Silvestro v. the Queen, [1965] 2 C.C.C. 253 (Sup. Ct. Can.). All of these cases dealt with the Criminal Code search warrant section, but there is no reason to believe that the situation would be any different under the Summary Convictions Act.

129 See, e.g., R. v. Steinberg, [1967] 3 C.C.C. 48 (Ont. C.A.).

Civil Rights:

Power to search the person ought not to be conferred under provincial law. The power is out of all proportion to the seriousness of provincial offences.¹³⁰

It seems to the writer that similar considerations operate when one thinks about the question of whether the province should authorize or control or prohibit wiretapping and electronic eavesdropping under some variation of the Summary Convictions Act search warrant provisions. More will be said on this point later in this report.

C. Statistics Act¹³¹

This statute is of interest for several reasons. First, it compels individual disclosure of information to the government that might otherwise be considered private. This information may be collected and published by the ministers of every provincial department of government, acting either separately, jointly, or jointly with any federal department of government,¹³² subject to the approval of the Lieutenant Governor in Council of joint collection arrangements and of all questionnaires. Information collected may be of an economic, financial, industrial, commercial, social or general nature.¹³³

The statute contains several provisions designed to ensure the confidentiality of answers given. A secrecy oath is required of all persons who collect, analyze or publish information collected under the authority of the act.¹³⁴ Answers to questions may not be passed between government departments by a minister without consent of the person furnishing the information.¹³⁵ No disclosure of any answers may be made without

130 Royal Commission Inquiry into Civil Rights, Vol. 1 p.426 (1968).

131 S.O. c.133 (1962-63). Relevant extracts from this statute are appended to this report as Annex D.

132 Id., s.2.

133 Id., s.1(b).

134 Id., s.4(1).

135 Id., s.6(1).

permission of the minister, and, unless the information has been jointly collected, the minister may only authorize disclosure within his own department or disclosure for a prosecution for violation of the act.¹³⁶

The statute poses several privacy problems. First, it contains no "sterilization" provision similar to section 15(2) of the federal Statistics Act, which prevents publication in a form which would allow connection of the published information with any particular person. Under the Ontario Act, the form of the published information may be prescribed by regulation,¹³⁷ but none have yet been published.

Second, as was pointed out at the Computers and Law Conference, there are no articulated norms concerning voluntary input of privately collected data.¹³⁸

Third, no civil cause of action is provided for a person or organization that is injured by an improper use or disclosure of information collected under the act.¹³⁹

Fourth, there are no effective objective standards to limit the type of information that may be collected. In theory, should the Lieutenant Governor in Council approve, production of privately collected data could be legally compelled under the act.¹⁴⁰ In fact, there is almost no conceivable sort of information that cannot be fitted into one or another of the general categories of "statistical information" as defined in the statute.

136 Id., s.4(2).

137 Id., s.10.

138 Leal, Privacy and the Computer, p.9, 3 June, 1968 (unpublished).

139 Id. at p.11.

140 On this point, the writer is not able to concur with the view that the act will "preclude the compellability of the production of ... a magnetic tape from a data bank in the private sector" (Leal, supra note 138). This would seem to be "statistical information" as defined in the statute, and its compulsory collection appears to be limited only by political, not legal controls.

Fifth, the apparent safeguard requiring consent by the person furnishing information as a condition precedent to interdepartmental disclosure can be avoided by a joint collection effort. The statute makes no attempt to lay down functional rules which could control joint collection on any "need to know" basis. No consent by the person furnishing the information is required for joint collection.

It is obvious that the Statistics Act was not drafted with the threat to privacy that is posed by the "data bank" in mind. Given the ineffectiveness of general statutes in modifying specific ones, future legislation in the privacy field will have to include a careful review of the Statistics Act, with appropriate amendments to prevent the establishment of any central clearing-house of information, and to define limitations on statistics collection in a much more careful fashion than has been done under this act. Presently, the government has what amounts to a blank check. This situation should be corrected.

D. Labour Relations Act¹⁴¹

This statute contains twelve sections under the heading of "Unfair Practices."¹⁴² These deal with the relationships of unions, employers and employees in the context of the rights and duties defined by the act.

It was suggested to the writer that the practice of employee surveillance by employers, through the use of "peepholes," television circuits, microphones, etc., might be controlled through the device of making any such activity an unfair labour practice. The present unfair practices sections are not directed toward any particular condition of employment, and it is the opinion of the writer that the act as a whole is not designed to deal with this sort of situation. Furthermore, the scheme of the act is to grant jurisdiction over unfair practices to the Labour

141 R.S.O. c.202 (1960).

142 Id., ss. 48-59.

Relations Board. By making covert surveillance an unfair practice, the province would be faced with either dividing the jurisdiction over protection of privacy between the Labour Relations Board on one hand and whatever agency or judicial body may be selected to deal with the rest of the privacy cases on the other hand, or with dividing jurisdiction over unfair practices between the Labour Relations Board and the privacy tribunal. Neither alternative is particularly attractive, both from the point of view of uniformity of application of statutory privacy standards or the availability of remedies in different forums.

Covert surveillance of employees is distasteful to contemplate and undoubtedly is a demoralizing condition of the exchange of labour for wages. However, it is suggested that the unfair practices portion of the Labour Relations Act cannot be satisfactorily adapted to the solution of this problem.

E. Private Investigators and Security Guards Act¹⁴³

This statute provides for the licensing of private investigators. It must be assumed that private investigators form one of the largest identifiable non-governmental groups engaged in an organized effort to invade privacy. Such activity by a private investigator was the matter that triggered the recent British Columbia Royal Commission on Invasion of Privacy, and there is no reason to doubt that the colleagues of the investigator in that case have been less inhibited in their use of electronic eavesdrop devices than was he.

The statute provides no guidance as to the means which may be employed by a private investigator to gain evidence or information, nor does it attempt to define what information one person may legitimately seek to obtain from another through the employment of a private investigator.

Any legislation dealing with the protection of the right to privacy will have to concern itself with spelling out much more clearly how

far, if at all, the possession of a private investigator's license exempts a licensee from the rules laid down therein. It is the writer's opinion that private investigators should be in no different position than anyone else.

It is of interest to note that several classes of persons engaged in the trafficking of information are excluded from even the minimal controls of the act. These include private investigators permanently employed by one employer in a business other than the business of providing private investigators; persons who search for and furnish information to employers as to the qualifications and suitability of their employees or prospective employees; insurance adjusters, etc.¹⁴⁴ These persons should be subject to the same rules in relation to the invasion of privacy as are private investigators.

F. Psychologists Registration Act¹⁴⁵

In-depth probing by means of the personality test is considered by many to be a serious invasion of privacy.¹⁴⁶ Since these tests are usually devised, administered and interpreted by psychologists, the question arises whether there exists any professional association of psychologists under provincial laws, similar to, say, the College of Physicians and Surgeons, through which privacy controls over testing could be exercised in the same way in which the medical profession exercises control over matters of standards and practice for doctors. The answer is no.

This statute establishes a Board of Examiners in Psychology which prescribes examinations for persons seeking to practice as psychologists.¹⁴⁷ Successful examinees are registered and certified by the Board. Beyond being empowered to suspend or cancel registration in a

144 Id., s.2. This does not exhaust the list.

145 R.S.O. c.316 (1960).

146 See, e.g., Westin, Privacy and Freedom, Chapter 6 passim.

147 The only unregistered psychologists that may practice in Ontario are those employed by a university or the federal and provincial governments.

few circumstances,¹⁴⁸ the Board cannot be said to be a provincially created supervisory organ of any professional organization of psychologists. It is not really concerned with what psychologists do once they have passed their examinations and been registered.

There is a private professional organization known as the Canadian Psychological Association. Membership in this body is not made a statutory condition precedent to registration by the provincial Board. It is not known what proportion of psychologists belong to this Association, or what, if any formal or informal links it maintains with the provincial Board. The writer has been informed that the Association has a committee on professional ethics and standards, but does not know whether any guidelines in this area have been published, whether they are considered to be binding, or whether any sanctions exist for their disregard. Further inquiries should be made in this direction.¹⁴⁹

If these tests are to be controlled (and in the writer's opinion, serious thought should be given to doing so), then some sort of professional ethical standards should be established in coordination with whatever legislative action is taken in relation to the protection of privacy. At present, no competent machinery for this purpose seems to exist under this statute.

G. Vital Statistics Act¹⁵⁰

This statute provides for the creation of a government record of births, marriages, divorces, deaths, still births, adoptions and changes of name. This information has traditionally been considered as being of a public or quasi-public nature. The issuance of copies of most documents is controlled by the statute, and the only matter to which the public has general access is as to whether or not a record in relation to a

148 The causes are set out in Regulation 501, para. 10, Ont. Rev. Regs. (1960).

149 The organization's headquarters address is: Canadian Psychological Association, 225 Lisgar Street, Suite 210, Ottawa 4, Ontario.

150 R.S.O. c.419 (1960).

certain person exists. The contents of any individual document are not a matter of public record. No major protection of privacy problems appear to arise under the provisions of this statute.

H. Public Inquiries Act¹⁵¹

This statute grants comprehensive powers to the government to obtain information, private or otherwise, when such is required in the name of good government or the conduct of the public business or the administration of justice in the province. Related to this act are some five-dozen other statutes under which various boards or designated persons may be granted the powers of a commissioner under the Public Inquiries Act.¹⁵²

The relationship of this act and the others that incorporate its powers by reference to the problem of invasion of privacy was fully considered in the recent Royal Commission Inquiry into Civil Rights.¹⁵³ It is sufficient to say that any full investigation of the problem of protection of privacy should give careful consideration to the recommendations made by the Royal Commission, and that general legislation relating to privacy must be coordinated with any revision of the Public Inquiries Act.

III. Legislation in other provinces

A. Telephone privacy legislation¹⁵⁴

Manitoba,¹⁵⁵ Nova Scotia¹⁵⁶ and Quebec¹⁵⁷ have provisions in their respective telephone acts designed to protect the privacy of telephonic

151 R.S.O. c.323 (1960).

152 Set out in Royal Commission Inquiry into Civil Rights, Vol. 1, pp.466-77.

153 Id., pp.383-497

154 The Manitoba, Nova Scotia and Quebec legislation discussed in this part is appended to this report as Annex E, F, and G, respectively.

155 Manitoba Telephones Act, Stat. Man. c.76 ss.36-37 (1955).

156 Rural Telephone Act, R.S.N.S. c.255, ss.44-45 (1954).

157 Telephone Company Act, R.S.Q. c.298 ss.3-4 (1941).

communications transmitted over provincially controlled telephone systems. The Nova Scotia and Quebec provisions are similar to those found in Ontario, and, as a general observation, are subject to the same shortcomings.

The Manitoba statute has taken the principles of the General Tariff of the Bell Telephone Company dealing with the use of recording equipment and has enacted them as statutory offenses in relation to the provincial telephone system. A substantial fine and imprisonment, which was not a feature of the federal regulations, is included in the Manitoba statute. In addition, the statute prohibits the use of any equipment for the purpose of intercepting and listening to messages passing through the wires of the provincial system, and provides that the possession of such apparatus shall be prima facie proof that it was being used in violation of the statute. A fine of not less than two hundred dollars or more than two thousand dollars or imprisonment for six months is provided for violation of this part.

The Manitoba statute is well worth further consideration as a part of any investigation into the protection of privacy. It is of interest not only because it provides a useful precedent for possible adoption in this province, but also in the context of the constitutional considerations discussed above under the Radio Act. The Manitoba legislature has made it unlawful to use, and has made it prima facie proof of an offense to possess devices which, for other purposes, can often be classified as radio apparatus. The form and tenor of this statute makes it highly unlikely that a person found with an F.M. transmitter designed to be used for telephonic eavesdropping could successfully argue that the use of his device was subject to regulation only by Parliament. By tying possession and use of these devices to section 92 legislation enacted for valid provincial purposes, the invasion of the federal radio field is almost non-existent.

Further, this telephone legislation has the indirect effect of protecting the confidentiality of communications over the Bell System in Manitoba. Possession of a telephonic eavesdrop device, for practical purposes, is outlawed by this statute. Any person who runs the risk of

owning such apparatus also runs the risk of not being able to convince a court that the only use to which it was put was in connection with the Bell System rather than the provincial system. It is, altogether, a neat bit of draftsmanship.

B. Authorization to wiretap

The City of Edmonton has a unique by-law allowing the City Police to attach recording devices to telephones or wires that are the property of the City of Edmonton Telephone System.¹⁵⁸ The Chief Constable of the City of Edmonton must swear before a magistrate that a telephone is being used for the perpetration or furtherance of some specified criminal activity and that "conventional enquiries made to date have not produced the desired result." The magistrate then issues an "authorization" to attach a recording device without a "beep tone." No distinction is made on the face of the enactment between offences against provincial statutes and offenses against the Criminal Code. It may be that the by-law is ultra vires as far as it purports to deal with Criminal Code offences, since it could be viewed as procedure in criminal matters rather than as a regulation of the conduct of the police or as telephone legislation. This is an open question, and since these applications must be made without the knowledge of the telephone subscriber, the constitutional validity of the by-law is unlikely to ever be determined.

This by-law is objectionable for many reasons. First, it does not prescribe any maximum length of time for which the authorization may be granted, but leaves this up to the police and the magistrate.

Second, it makes no provision for judicial supervision of the use or disposition of the recordings obtained.

158 City of Edmonton Telephone By-law No. 2295, as amended by By-law 2315, dated 26 Nov., 1962, and By-law 2633, dated 26 Jan., 1965. The By-law, the required police statutory declaration form and the magistrate's authorization form are appended to this report as Annex H.

Third, the police declaration is based upon subjective standards. The Chief Constable is required to swear to the existence of reasonable grounds of belief, but is not required to subject his grounds to the scrutiny of the court, his ipse dixit being sufficient. In the opinion of the writer, this type of authority should not be granted below the level of a minister of the Crown who is directly answerable to the legislature.

Fourth, the by-law makes no qualitative distinction between serious and minor criminal offences, and, as noted above, could extend to even the most trivial of provincial offences.

Fifth, the system provided for obtaining the authorization gives the appearance of the interposition of a neutral judicial authority between the police and the citizen, without providing the substance thereof. The role of the magistrate here is ministerial, not judicial. He simply responds mechanically to a stimulus.

Sixth, even if the magistrate chooses to require some justification from the police, or otherwise does more than the bare bones of the by-law seem to require, this sort of authorization should not be within the jurisdiction of this level of court. The Supreme Court of the province appears to be a minimum requirement in this respect to the writer.

Other possible alternatives for suitable controls over police wiretapping will be set out later in this report.

C. The Privacy Act, British Columbia¹⁵⁹

This statute creates a statutory tort, actionable without proof of damage, for the act of violating the privacy of another person, wilfully and without claim of right. The statute does not make violation of privacy a statutory offence, and therefore skirts most of the areas of constitutional difficulty that have been discussed in this report.

159 An Act for the Protection of Personal Privacy, 1968. This statute has not been bound as of the date of this report. It is appended hereto as Annex I.

The statute creates a second statutory tort, also actionable without proof of damage, for using the name or portrait of another person for advertising or promotional purposes without his consent.

The Privacy Act can be said to be a legislative implementation of the United States rule set out in the Restatement of the Law of Torts:

A person who unreasonable and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.¹⁶⁰

Generally, this British Columbia statute is a desirable step forward in the field of protection of privacy. Its prohibition against commercial use of a person's name or likeness without consent has reasonably definitive standards and should not give the courts too much difficulty. The problem will arise when litigation occurs under the first tort described above—the invasion of privacy pure and simple. The statute states:

The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given to the nature, incidence and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.¹⁶¹

As was pointed out earlier in this report, substantial justification can be mustered in support of almost every means by which privacy is invaded. This statute represents a girding of the legal loins in British Columbia against an invading army, whereas the greatest threat to privacy may be posed by guerrilla warfare. It is the totality of hundreds of individually reasonable small assaults upon privacy, as much as the hidden tape recorder or wiretap, that adds up to the modern danger. Litigation under this statute will fight over the ground of what is reasonable in each case — a situation

160 Restatement of the Law of Torts, s.867 (1939). Some American States make some forms of invasion of privacy a statutory offence: New York Civil Rights Law ss.50-51 (commercial use of name or likeness). The American cases up to 1964 are collected and discussed in Prosser, Law of Torts, s.112 (3d ed. 1964).

161 Privacy Act, s.2(2).

which, under our legal process, renders any reference to the general problem of protection of privacy faced by the plaintiff irrelevant, prejudicial to the defendant, and not something which should properly be considered by the court. This legislation is fine as far as it goes, but, absent what would amount to a comprehensive code of privacy, setting definitive norms for information trafficking, control of the means and physical implements for invading privacy, control of psychological in-depth testing, input and disclosure standards for school, medical, and governmental records, and all of the rest — in the absence of clear legislative policy in relation to the larger problem of privacy, in short — then this statute standing alone could easily become a well-intentioned dead letter. The statute not only is not backed up by any such code of privacy, but also creates significant exceptions by specifying certain activities which cannot be invasions of privacy. These include the conduct of a peace officer acting in the course of his duty for the prevention, investigation or discovery of crime, any act authorized or required by any provincial law, and the conduct of any public officer engaged in an investigation under provincial law, so long as his actions are proportionate to the gravity of the crime or matter subject to investigation, and were not committed in the course of a trespass.¹⁶²

The statute, then, creates an almost blanket exception in favour of what may be termed "duly constituted authority". Unless the statutory bases of these authorities are reviewed and revised with the problem of privacy in mind, as has been recommended by the Ontario Royal Commission on Civil Rights in the area of investigatory powers, the Privacy Act amounts to a virtual license for governmental invasion of privacy, cast in the form of a protection.

162 Id., s.3 Exceptions are also made for fair comment and privilege.

PART FOUR: PROPOSED LEGISLATION

I. Federal bills

Three private member's bills that relate to privacy have been introduced in Parliament in the last few years. All have died on the order paper. Two of these, Bill C-103 (1964)¹⁶³ and Bill C-45 (1966)¹⁶⁴ would have authorized police wiretapping pursuant to a variation of the Criminal Code search warrant, in cases where the suspected offence carried a penalty of at least ten years imprisonment, and the procedure was authorized by a judge of a superior court of criminal jurisdiction. All other interceptions of telephone and telegraph communications were made offences punishable by imprisonment for up to two years.

The third of these, Bill C-19 (1967)¹⁶⁵ was a more comprehensive effort. This bill created a criminal offence out of either obtaining or disclosing the contents of wire communications, as well as using any apparatus for eavesdropping, or disclosing any information obtained as a result of the use of such apparatus. Exceptions were made in the case of national security matters, and for investigations for the purpose of the administration of justice upon request by a provincial Attorney-General to a Magistrate or Justice of the Peace.

Detailed analysis of these bills will not be made. They contain many desirable features, although they come nowhere near covering the field of privacy that requires legislative protection. Nor would the most comprehensive of the federal bills, when taken together with, e.g., the British Columbia Privacy Act, provide sufficient safeguards for privacy when one considers the nature of the threat posed by modern conditions of life. They are most significant in their representative character as some of the first manifestations of the realization that unless privacy lines are drawn soon in Canada, it may be too late to draw them.

163 Appended to this report as Annex J.

164 Appended to this report as Annex K.

165 Appended to this report as Annex L.

II. Provincial bills

The only provincial activity in the privacy field that has come to the attention of the writer, other than as noted above, was the Saskatchewan Wiretapping Prevention Act, 1965, Bill No. 81.¹⁶⁶

This bill was basically privacy legislation cast in the form of telephone legislation. It also came close to the area of criminal procedure. It sought to attract provincial jurisdiction by applying only to the provincial telephone system. The first ten sections of the bill duplicated substantially the provisions of the Manitoba Telephones Act discussed above. However the bill went on to grant wiretapping authority to the police in the form of an exception to the general prohibition. Any peace officer could make an ex parte application to a judge for authorization to intercept and record telephonic communications. If he could satisfy the court that reasonable grounds for belief existed that evidence of an offence under the Criminal Code, the Juvenile Delinquents Act, or the provincial Securities Act could be obtained, then permission to wiretap would be granted. The Attorney-General of the province was not involved.

Although this was a government bill, it was not proceeded with and did not become law. Correspondence with the Attorney-General of Saskatchewan indicates that he will not proceed with this bill "in light of the possibility that the Criminal Code may be amended to cover this subject matter."¹⁶⁷

166 Appended to this report as Annex M.

167 Letter of 16 August, 1968 to the writer from G.C. Holtzman, Office of the Attorney-General, Saskatchewan. Mr. Holtzman did not indicate the basis for his belief as to the possibility of future federal action.

PART FIVE: MEASURES THAT SHOULD BE CONSIDERED IN ONTARIO

I. A twenty-point proposal

It is hoped that at this point in this report, the reader will have a good overall view of the major considerations that define the problem of protection of privacy. The constitutional difficulties that arise are intricate but not insurmountable, and a major provincial legislative programme for the protection of privacy could be undertaken without either the danger of straying into an occupied field, or leaving the penumbra of section 92.¹⁶⁸ The selection of Ontario legislation illustrates that this province is behind some of the others in Canada in moving to deal with modern privacy problems, and the selection of legislation from other jurisdictions indicates that no one has yet attempted in Canada to muster the necessary implements of protection that modern conditions demand. The approach to the protection of privacy in this country has been episodic and fragmentary, poorly conceived and only incompletely executed.

One of the major flaws in the collective Canadian approach evidenced by the mixed bag of statutory provisions set out above is that legislatures have been primarily concerned with treating the symptoms rather than trying to cure the disease. The preoccupation with wiretapping is one significant manifestation of this. The protection of privacy poses major problems of a social, psychological, economic and ethical nature which are simply non-responsive to attempts to deal with them either in terms of pre-existing legal categories or in any fashion that falls short of being fully comprehensive. If the objective is to grant protection to privacy that is reasonable under the circumstances of any given case (and the writer thinks that this is a proper starting point), then legislation must not only limit the claim to privacy by this formula, but should also limit those competing claims that are based upon considerations of public interest, economic

¹⁶⁸ It should be emphasized that the constitutional problems in the privacy area have been dealt with only in the abstract. Definitive answers thereto must be sought when we draft definitive legislation. However, most of the broad principles that seem to the writer to bear on the subject matter of this report indicate that the province may legislate with considerable freedom.

well-being, commercial expedience, control of anti-social activities, and all the rest. Without creating parallel norms, particularly in those areas with either a strong laissez-faire tradition or an established set of distinctive institutional values, then the exceptions inherent in granting protection to privacy that is "reasonable under all the circumstances" may eat up the rule. Loss of privacy, and the resulting decline in the quality of our lives, is really the by-product of hundreds of well intentioned attempts to come to grips with the major problems of our modern urban-industrial society, using advances in technology and streamlined commercial practices to achieve this with a minimum expenditure of time, effort and resources. Controls prompted by the apprehension that the whole of these attempts is unreasonable, but the effectiveness of which depend solely upon a determination of whether any constituent part thereof is by itself unreasonable, appear to the writer to be foredoomed. If we are concerned with the jeopardization of the quality of life, then the scope of our future actions must equal the scope of that which is at stake. The creation of broad spectrum limitations upon the means and the interests that threaten this quality is in fact the substance of the protection of privacy; the mere articulation of a right to privacy, with nothing more, is simply its shadow.

With these considerations in mind, the writer recommends that a full investigation into the protection of privacy should give serious and thoughtful attention to the following categories and subjects of concern:

1. Creation of the offence of invasion of privacy.
2. Creation of the tort of invasion of privacy, with appropriate remedies.
3. Establishing controls over the sale, advertising, use and possession of mechanical and electronic wiretapping, eavesdropping and surveillance devices.
4. Establishing controls over governmental acquisition, use and disclosure of personal information, with appropriate personal remedies.
5. Establishing controls over private sector acquisition, use and disclosure of personal information, with appropriate personal remedies.

6. Creating rules for electronic surveillance, wiretapping and surreptitious invasion of privacy in all forms to control abuses in the administration of justice in the province.
7. Creating rules to control the use of security devices as a means of secret surveillance.
8. Defining "consent" in its various contexts where consent means that privacy is not invaded.
9. Defining the extent to which an owner of public accommodation facilities owes a duty to patrons to not participate in activities which violate their privacy.
10. The encouragement of the development of organizational and professional ethical standards for the protection of privacy.
11. Establishing controls over certain conditions of employment which violate the right to privacy.
12. Developing mechanical and electronic safeguards to control unauthorized output of personal information from computer memory banks.
13. Specific legislative regulation of the conduct of persons and institutions, the legitimate activities of which per se establish a threat to privacy.
14. Making contracts that have as their object the unwarranted invasion of privacy of a third party void ab initio.
15. Giving consideration to the inclusion of privacy as a fundamental right in the proposed Ontario Bill of Rights.
16. Establishing rules that create the highest degree of visibility for all surveillance by the "public authorities" that can be attained without unduly hampering the achievement of valid social ends.
17. Encouraging the establishment of a parallel federal investigation with complete provincial-federal cooperation to ensure the creation of complementary controls that are effective measures for the protection of privacy.
18. Reviewing and recommending appropriate changes in all provincial legislation in which the considerations of privacy have not been afforded adequate protection.
19. Establishing and promulgating a definitive public policy against any routine compilation of a "life history" dossier or profile either by government or by the private sector or by any combination thereof.
20. Creation of an independent agency with educational, persuasive, evaluative, investigatory, decisional, regulatory, reporting and coercive powers to protect and foster the right to privacy in all of its aspects.

These twenty points all involve normative judgments in the light of a multitude of legal and social facts. Some of these latter data are

matters of general knowledge, some can be safely assumed, and others call for specific research. In the following pages, this report will deal with some of the significant points raised above without necessarily making a fine distinction between values and assumptions and facts. These are simply subjective observations which both point out alternatives and suggest solutions to the problems inherent in these twenty points.

A. Controls over the sale, advertising, possession and use of surreptitious mechanical and electronic wiretapping, eavesdropping and surveillance devices

This is an essential step in the protection of privacy. It is legally comparable to the alcoholic beverage prohibitions that existed a generation ago, and valuable precedents could doubtless be found in statutes, regulations and decisions that dealt with that subject. If the legislature so desired, it could simply declare that such devices are incapable of being the subject of property rights in the province.¹⁶⁹

Considerable variations on this and similar themes are possible. An exception could be made in favour of devices which enjoy a federal license, which would require provincial-federal cooperation to some degree.

Provincial licenses could be used as a regulatory or prohibitory measure, with penalties for unlicensed possession or use.¹⁷⁰ Constitutional

difficulties may be avoided by applying the same licensing rules to all

surreptitious privacy invading devices whether they are radios or not. A

contract for the sale of such a device could be made a nullity.¹⁷¹ If the

devices themselves or their owners are not licensed, then dealers engaged

in the sale of such devices could be licensed, sales and name of purchasers

169 Cf., The Prohibition Act, Stat. P.E.I., c.27 (1937), as amended Stat. P.E.I., c.9 (1943) s.88: "No property right of any kind shall exist in liquors unlawfully kept at any place in this Province."

170 See generally MacDonald, The Licensing Powers of the Province, 17 Can. B. Rev. 240 (1939).

171 Subject to the possible limitation that the legislature of one province cannot destroy civil rights outside the province by interference with contractual rights. See Ottawa Valley Power Co. v. H.E.P.C. [1937] O.R. 265, 304; Beauharnois Light, Heat and Power Co. v. H.E.P.C., [1937] O.R. 796 (Ont. C.A.).

registered, or delivery under the contract without a valid federal license in the hands of the purchaser could be forbidden. Manufacture of these devices within the province could be either licensed or forbidden. This would be a useful addition measure of control, inasmuch as some forms of surveillance apparatus, such as an induction pickup, can be cheaply assembled out of standard radio parts. It may also be constitutionally possible to prohibit importation into the province of surreptitious eavesdrop devices. However, the matter is not concluded by authority.¹⁷²

Advertising could be partially controlled by the province, to the extent and in the same manner as it now controls liquor advertising. The bulk of this task would, however, be federal.

Subject to whatever specialized use may be deemed to be allowable (e.g., the use of the parabolic reflector to record distant bird calls) the writer is of the opinion that such devices should not be available to the public at large, and that firm controls should be imposed. Consideration should be given to the question of whether existing devices should simply be confiscated or whether they should be made the subject of compulsory purchase at a fair price. Using an initial inducement of cash may be a more effective means for ridding the province of such devices than a flat ban. A similar inducement may be an offer of amnesty after the first successful prosecution for unlawful possession.

The use of such devices should be made an offence, and should also be made prima facie evidence of an unreasonable invasion of privacy in a provincial tort action.

172 One of the questions for decision in the Local Prohibition Case, [1896] A.C. 348, was whether a provincial legislature had jurisdiction to prohibit the importation of liquor into the province. In lieu of the negative answer given in the reported judgment, the order-in-council that followed substituted these words: "No useful answer can be given to this question in the absence of a precise statement of the facts to which it is intended to apply. There may be some circumstances in which a provincial legislature will and others in which it will not have jurisdiction."

Optical surveillance equipment poses a more difficult problem, since it has many bona fide uses (e.g., photography, plant security) not connected with invasion of privacy per se. Licensing of these devices would simply be unjustifiable harassment in the vast majority of cases. The best controls here would be those directed toward illicit use, rather than those regulating possession or sale.

B. Controls over government acquisition, use and disclosure of personal information

This is another vital area in which immediate steps should be taken. The articulation of standards should help prevent the necessity for a Royal Commission on Civil Rights every few years to bring our legislation back in line with our ideals. As an initial measure, the inquiry powers of the government should be carefully re-defined in accordance with the recommendations of that Commission. A review of the Statistics Act should also be made with the same considerations in mind, both as to what may be collected, and as to norms for controlling disclosure, joint collection, and non-statistical or regulatory use.

Standards governing the circulation or disclosure of personal data information within the ministry or government agency that collects such data should be laid down in departmental regulations, and should be on a strict "need to know" basis. Vertical compartmentalization of the use and circulation of personal data should be imposed within each ministry or agency, with a decreasing horizontal right of access as one descends the levels of internal responsibility.

Data collected by or in the possession of the government could be classified as either of an intelligence or statistical nature, or as in the public domain, with differing use and disclosure rules for each. Where information is necessary for general governmental use, "sterilization" measures should be applied before it is passed out of the control system of the ministry or department that is in initial possession. As a good general rule, personal data should not be passed between ministries or agencies,

or between the provincial government and the federal and municipal governments, unless there is a need to know and consent to general circulation has been obtained from the party supplying the data. Such consent is of even greater significance when disclosure by government to a private party is contemplated. Different access thresholds could be devised depending upon either the nature of the information (e.g., intelligence, statistical or public domain) or the purpose for which it is sought, or both. A lawyer who is handling an unsatisfied judgment may have a bona fide need to know whether there is an automobile registered in the name of the judgment debtor; an oil company interested in sending credit cards to owners of certain late model automobiles may not have a need to know. A prospective employer may wish to verify whether or not a person has been imprisoned or a patient in an Ontario Hospital for the mentally ill. As a conscious policy choice, despite what appears to be a need to know, such information could be withheld. A bonding company may or may not be in a different situation. A slight upward adjustment in its actuarial rates for bonding may be a cheaper social cost than the possible personality disintegration of persons who are unable to break with their past even if they have an honest intention to do so. A private welfare agency or the John Howard Society may be in a still different situation, to which different rules should apply.

Personal data on government employees is another facet of this problem. Personnel procedures should be reviewed to ensure that the man working for the government is no more subject to the laying bare of his private life than is his non-civil service counterpart. Distinctions can be made in some areas where there is an overriding public interest, but this should not be presumed to exist in all cases. For example, a probing in-depth personality test might be a positive step forward in keeping sadists or neurotics out of the police department, but there would be no blanket justification for the use of such tests for all civil servants. Disclosure of financial holdings for conflict of interest purposes might be required for more government employees than would be reasonable in the private sector — but as a general rule, the person who works for the state

should not be deprived of his privacy for this reason alone. The activities of the government have a tremendous conditioning effect upon the attitudes of the public at large, and setting the governmental house in order if needed is a prime factor in the protection of privacy.

None of these specific considerations can be successfully dealt with in the abstract. General norms of governmental protection of privacy should be articulated, be it informally, by proclamation or by legislation, and each ministry or agency of government then required to review its own internal procedures in light of the kinds and amounts of personal data that it collects and uses, and issue regulations conforming to the general rule. It is widely accepted that wherever the government licenses, controls or otherwise regulates economic and social activities for the common good in pursuit of deliberate public policies, then it has the right and need to gather enough relevant data to do this efficiently. Yet the fact that a large mass of personal data about the people and businesses in the province exists in government files does not justify either the collection of more than is necessary to implement these policies, or any disclosure outside of either the government department or ministry or the government as a whole to persons who have some interest in the same data for different reasons. The government should not become the vehicle for distribution of personal information that it happens to possess simply because it has the right and the need to collect it in the first place.

Since excessive secrecy in governmental operations is as great an evil as governmentally-fostered invasions of privacy, care must be taken not to inhibit the bona fide right of the public to know about the operations of the government. Westin suggests some form of judicial review as a means for preventing the abuse of non-disclosure regulations, with the burden on the government to show that the privacy of the citizen rather than the masking of activities that should be known to the public is the reason for withholding information.¹⁷³ This, or some variation thereof may be useful in Ontario.

173 Westin, Privacy and Freedom, 386-87.

Consideration should also be given to the creation of private remedies against the government to control its acquisition and use of private information. The government is in many respects in the position of a trustee that may only act in certain ways. If the cestui-que-trust is injured or apprehends injury, he should have his remedy. Until we have arrived at the position where we know that public officers will always do what is right for the individual, then their conduct should be capable of being questioned by some judicial body or board, with appropriate injunctive relief and damages available to the aggrieved party.

C. Controls over private sector acquisition, use and disclosure of personal information.

The objective collection of personal facts poses difficult problems in many areas. Together with governmental data collection, the totality of this trend can only lead to "behaviour for the record," with a stifling effect upon freedom of expression, association, speech, activity and belief. The size of the problem grows in direct proportion to the growth of computer usage. However, this may prove to be part of the solution as well as part of the problem. No legislative controls that can be devised by the mind of man are too complex to be programmed into a computer.

At a minimum, the following general areas should be investigated: the press, economic, commercial and social data collection for the internal use of the collector, and economic, commercial and social data collection for the use of others.

(1) The press

The press must be considered because it is the traditional medium through which personal data is collected and made known to the public. The major concern here is not to subject the press to stringent controls, as much as it is to ensure that new norms of privacy do not inhibit its present legitimate functions. The attempt to define "legitimate" in terms of the press in a democracy is a ticklish business. Whatever rules are laid down to prevent the invasion of privacy by the press should be capable of

invocation only by a private person pursuant to a civil remedy. The present laws of libel and slander are almost adequate. The person who comes voluntarily or involuntarily into the public eye is subject to limitations on his right to be let alone, within the boundaries of fair comment. But the person who leads what the Restatement of Torts calls "a lawful and unexciting life" has a right not to be exposed to the public at least to the extent that this would be offensive or embarrassing "to persons of ordinary sensibility," even if this falls short of the common law test of exposure to hatred, ridicule or contempt. The British Columbia Privacy Act has made an exemption in favour of publication of privileged matters or fair comment on matters that are of public interest, and it may be that this covers the situation as completely as any statute can. The important things to remember are that the role of the press must be safeguarded, and that gains in privacy not be made at the cost of a free press.

(2) Collection for the internal use of the collector

The collection of economic, commercial and social data about an individual for the use of the collector should be governed by the basic rules of (1) consent and (2) non-disclosure to others. One legislative approach to this problem would be to make non-consensual collection or disclosure of such data a prima facie invasion of privacy, with the burden on the collector to show that he came within some exception to the rule forbidding this activity.

There are several reasons why this may be a desirable approach. First, casting the protection in this form would imply a legislative policy that the individual has a right and a protected interest in being left alone and not having his affairs known to others unless he consents, rather than the position that it is legitimate to gather personal information about an individual unless he objects. If one accepts the comment made under the discussion of the British Columbia Privacy Act, that it is the totality of invasions of privacy that poses the real threat rather than the unreasonableness of any given bit of snooping, then the suggested form for

the legislation might be a more realistic way in which to achieve the goal of protecting privacy.

Second, this form of protection would provide a means of controlling the disclosure or sale of personal data among interested groups in the private sector. Here again the position should be that this is undesirable in itself, although a single instance may not fit, for example, the British Columbia test of being "unreasonable." Organizations that are in legitimate possession of personal data with the express or implied consent of the individual should be required to begin with the premise that they must not disclose it outside of their own structure without permission, rather than that they may do with it as they please so long as there is no unreasonable quality to their activity. We may have arrived at the point where a judge or jury is sufficiently sensitive to the modern problems of privacy that even a single instance of disclosure of where a person banks, by whom he is employed, his salary, where he travels, what kind of car he owns, names of his dependents, what he buys, his social affiliations or what have you, would be viewed as being unreasonable. But, if we have not reached that stage, and yet are concerned with the traffic in such information, then the above suggested approach may be worth consideration. It would require the potential discloser to come back to the individual before doing anything else with the information than using it for the purpose for which it was furnished or obtained in the first place. If not, he acts at his peril.

Under the suggested formula, express consent to either the acquisition or the disclosure of the protected data would be an absolute defence. Implied consent, if shown, should have the effect of removing the prima facie invasion of privacy aspect of the case. If implied consent could be proved, then the plaintiff would only be able to recover if he could show that the nature or scope of the data collection or the disclosure went beyond the scope of the implied consent. This is simply another way of saying that the activity was "unreasonable," and the position of the parties would then be the same as if they were under the British Columbia Privacy Act.

The exceptions to liability under the rule could be made both by defining certain categories of economic, commercial and social data that are matters of legitimate public knowledge, and certain relationships between the parties wherein consent will be implied. An application for an insurance policy may imply consent to reasonable investigation about living habits, assets, etc., although not necessarily to sale or disclosure of such data outside the insurance company. Failure to satisfy a judgment may imply consent to private investigation into the debtor's assets, salary, and other economic facts that may be inquired into by law in a committal hearing for contempt arising out of the failure to pay the judgment. A cause of action between the parties may imply consent to ascertainment of the existence of facts relevant to the successful prosecution or defence of the action. Another form of implied consent may be in relation to the collection of information that is or has been at some time a "matter of public interest" according to the rules which would govern newspapers, subject perhaps to some sort of temporal limitation. Application for employment may imply consent for reasonable inquiries into a person's background, in the same manner as would application for an insurance policy. The point to be made is that collection of personal data which is unrelated to any valid social or economic end may be undesirable even if it is not unreasonable. This is a policy decision which should be made.

An alternative to the general prohibition against data collection and disclosure unless consented to would be to lay down a rule similar to the provisions of the British Columbia Privacy Act, accompanied by legislation to control certain forms and types of surveillance, investigation and data collection by specified agencies and organizations, and control of the internal use and disposition of personal data by certain collectors. This would assume that many organizations have valid reasons to inquire about individuals, related to their particular social or commercial functions, but that there are certain of these over which qualitative controls must be established, and that there are certain specific areas which must be left alone. For example, inquiry into these areas or disclosure of information

that is in the legitimate possession of a collector without express consent in either case could be deemed prima facie unreasonable. The protected zones could include religious affiliation or belief, mental health data, political ideology, social affiliations, sexual behaviour, and the solicitation of the opinions or conclusions of any person as to whether the individual is "normal," "well adjusted" or "honest." This data could still be sought or disclosed, but the person doing so would have the burden of showing that his actions were based upon a reasonable and legitimate interest, rather than requiring the plaintiff to show that they were unreasonable. Collection, use and disclosure of other personal data might be left in its present state, subject to the possibility that any individual would still have the right to prove that an unreasonable invasion of his privacy had taken place outside of a protected zone.

Another alternative position would allow collection of any data, but would create zones of protection against disclosure of certain types of information.

The question as to what organizations and agencies have presently legitimate functions that pose a serious threat to privacy deserves careful scrutiny. All that require or seek personal information about members of the public are potential subjects for some manner of regulation on privacy grounds. Controls could be generally implemented through the prima facie unreasonability device already considered, as a feature of a tort action, or in certain cases, by making some forms of conduct an offence against provincial law. For example, the obtaining of personal information by private investigators falsely representing either the subject's consent or their own authority could be made a statutory offence. Insurance investigators and newspaper reporters might also be made the subject of similar specific legislation.¹⁷⁴

174 The conduct described in the text does not appear to be caught by either section 303 (False Pretences) or 346 (Personation) under the Criminal Code. Section 303 deals with obtaining property, not personal information, and section 346, requires personation of an actual person, not false representation of authority. In the United States, the mother of Richard Speck, the accused Chicago slayer of eight nurses, was induced

(3) Collection for disclosure to others

Collection of economic, commercial and social data about individuals done with the intention of and for the purpose of disclosure to others poses another major privacy problem. As an initial starting point, it is recommended that this not be left as an unregulated commercial activity, but should be specifically licensed and controlled by the province. The major areas of concern under this head are the activities of private investigators and commercial credit reporting firms. In the case of private investigators, as discussed previously, licensing exists without specific regulation. In the case of credit rating services there is neither licensing nor regulation of any sort.

The type of information that is "on the record" and which is presently subject to legitimate collection and sale is extremely varied; blemishes on the work record, bank balance, borrowing habits, repayment delinquency, outstanding loans, whether the individual is considered to be a "credit risk," some medical data, history of mental illness, sexual deviancy, arrest and law suit records, education, birthdate, birthplace, parents' occupation, net worth, layout and construction of home, involvement in automobile accidents, political affiliation, employers, past residences, dependents, value of home and annual income.¹⁷⁵

In the case of credit rating services, consideration should be given to whether there is any information that should not be allowed to be collected or disclosed. The writer believes that the protected zones listed above may make a good basis for discussion.

The next point to be considered is verification. According to one newspaper report, most of the 140 credit bureaus in Canada will not show their file to the individual because of "fear of libel action."¹⁷⁶ More

174 (continued) to reveal considerable information about her son by a newspaperman who represented himself as a lawyer interested in acting on his behalf. Such conduct should be made punishable on privacy grounds.

175 The examples in the text are given as accessible records for routine inquiries in Packard, The Naked Society, 6 (1964).

176 Toronto Globe and Mail, 9 Aug., 1968, p. B-1.

accurately, the legal position is that sending out a credit report is publication within the meaning of the Libel and Slander Act.¹⁷⁷ Risk of whether a report is libelous should be placed upon the reporting agency and its source, not upon the injured individual; perhaps a duplicate of every formal report made should be automatically sent out to the person concerned, and a periodic listing supplied in the case of informal disclosures. There should be machinery whereby an individual can challenge the accuracy or the relevancy of any given item in his credit rating, and require the credit bureau to correct its records if necessary. Trafficking in reputations must be controlled.

It may be desirable to place a limitation upon the length of time that an unfavourable bit of information may remain in a credit record file, even if it is true. Thought should be given to establishing a variable factor scale, giving weight to time, whether an unpaid debt is disputed, and the amount in issue. A ten dollar dispute can remain on a credit record forever, as things now stand. Perhaps a bankruptcy should so remain. Lines can be drawn in between these extremes.

Visibility is important in these transactions. A person's commercial character can be permanently stained by a dishonest report given by someone as well as by a dishonest failure to pay a legitimate debt. The methods of operation as well as the type of information brought into the credit reporting system should be reviewed and regulated. If making or publishing a false credit report doesn't fit into common law libel, then consideration should be given to the creation of this as an independent tort.

Private investigators should be subject to the same rules regarding invasion of privacy as is any member of the general public. Further, the investigator should be deemed in all cases to be an agent of the person who contracts with him to procure information, for the purposes

177 Gaskin v. Retail Credit Corporation, [1965] S.C.R. 297.

of an invasion of privacy action in tort. Another protective device might be to declare that contracts which have as their object the invasion of privacy of a third party are unenforceable. Another step that could be taken would be to make invasion of privacy or the use of any surreptitious eavesdropping, wiretapping or surveillance device, electronic or mechanical, by a private investigator, a violation of the regulations under the Private Investigators and Security Guards Act, and, at least in the case of the use of this sort of apparatus, grounds for suspension or revocation of the investigator's license.

D. Establishing controls over certain conditions of employment which violate the right to privacy

The employer-employee relationship raises several major privacy problems. One is the question of how much private background information an employer is entitled to know or look for because of the actual or prospective relationship between the parties. A second problem involves the scope of legitimate supervision on the job. A third involves the invasion of privacy arising out of the protection of the employer against suspected employee dishonesty. A fourth involves the disclosure of personal information from an employer's personnel records to investigators, private parties or prospective employers.

In the case of job applications, two ideas may be put forward. One is that there may be protected zones here as well as elsewhere — certain information should not be allowed to be sought nor required to be disclosed when a person applies for a job. The Ontario Human Rights Code already creates some protection in this area, and this may be sufficient. However, the writer feels that the in-depth personality test should also be made the subject of a general prohibition, with certain exceptions for jobs that may involve a high degree of stress or danger to the public or to fellow workers. The police, air traffic controllers, pilots and drivers of public conveyances may be instances of exempted employment.

The second idea is that of erasure of the record after a passage of time. This involves both the application for a job and disclosure

of information by past employers. It may be desirable to have a "statute of limitations" on how far back a prospective employer may search, and the non-disclosure of some background information after a number of years. One approach would be to prohibit job application forms (or interviewers) from seeking information beyond say, five years back in a person's history. It is reported that the federal government is considering erasure of criminal records after five years. The real damage is not done by disclosure of such records in subsequent trials, so much as it is done by disclosure of such records when the man who has presumably "paid his debt" seeks a responsible job. Likewise, the former mental patient is a marked man. The question "Have you ever been a patient in a mental hospital?" should never be allowed at all in the vast majority of job applications. Similarly, a prohibition could be enacted against questions that went beyond, for example, "Have you been convicted of a summary conviction offence or any provincial offence within the past two years, or an indictable offence within the past five years?" Perhaps a person should not be required to disclose his employment beyond the preceeding five years. Former employers should not be allowed to disclose information in their possession relating to the criminal record or mental health of a former employee, as well as any data they may possess on his religious, political or social affiliations. Perhaps personnel records on former employees that are older than ten years should not be disclosed at all except pursuant to a court order. Our record-keeping society is making it increasingly difficult for an individual to overcome his past. To allow this trend to foreclose the possibility of ever doing so can only lead to an increase in the alienation and "garrison mentality" that already accounts for a considerable amount of our social disorder. The machine never forgets — but man should.

Supervision by machine, microphone or television poses a difficult problem. It is an economical way to control the activities of employees and, at the same time, is a serious dehumanization of employment. In unionized organizations, the writer would favour legislation that specified that the use of such supervision devices would be a bargaining point in every

collective agreement, the same as wages. Whether they could be used at all, or continue to be used, or the extent of their use should require agreement between union and management. Non-union organizations pose a different problem, and a more difficult one. One approach would be to simply prohibit these measures of supervision for non-union hourly employees. An alternative would be to require an externally supervised approval vote of employees prior to its installation and a renewal vote every few years. A third alternative would be to allow this sort of supervision so long as it is completely overt, with cameras or microphone exposed to view, with signs indicating that the area is under supervisory surveillance, and perhaps a light that comes on when a monitor is in use.

Employee dishonesty can be checked by the use of the polygraph or "lie detector". In the main, there is nothing that an honest man has to fear from the use of this machine, any more than he need fear total surveillance by police or complete exposure of all his past activities. But this is what the right to privacy is all about. At least three alternatives are possible: total ban, use with consent with no penalty for non-consent, and unrestricted use, with non-consent being grounds for dismissal. The writer favours the first of these. As Westin points out, there are serious questions of reliability involved in the polygraph.¹⁷⁸ No standards exist for training of operators, control over their records, or standards of apparatus used. A polygraph report is pure hearsay, both legally and psychologically. Furthermore, it is unrealistic to place too much faith in any "no penalty for non-consent" safeguard. This, as well as making non-consent grounds for dismissal, would fall as heavily upon men of principle as upon dishonest employees, in the same fashion as did the "loyalty oaths" that were so popular in the United States a few years ago. The writer feels that insurance and bonding are possible alternatives with a lower social cost than the polygraph.

178 Westin, Privacy and Freedom, ch. 9 (1967).

Another control measure over employee dishonesty, as well as the dishonest activities of non-employees, is covert surveillance by the same means as used for covert supervision. These devices have valuable uses so long as they are confined to the purpose of protection of life or property, rather than general supervision. Areas under covert surveillance for security reasons should perhaps be clearly marked. It seems to the writer that the issue of privacy involved in, for example, the taking of a photograph every time a safe or file cabinet is opened is of a much lower order than general surreptitious surveillance on the job by an employer. Other uses of security devices may be more borderline. Court approval may be desirable before an employer is allowed to conduct an investigation in his plant which entails certain forms of surreptitious employee surveillance. It should be an object of further study to find out what is presently being done, what apparatus is used, and how best to articulate rules controlling its employment.

E. Creating rules for electronic surveillance, wiretapping and surreptitious invasion of privacy in all forms to control abuses in the administration of justice in the province

This is one of the core areas in any approach to the protection of privacy. It raises social, constitutional and normative problems of the first order.

One fine line that exists is the question of where rules regulating the conduct of the police cross over into the federal field of "criminal procedure." There is almost unanimity on the idea that before the police may wiretap or engage in surreptitious electronic surveillance, they should be required to apply for some sort of permission from a duly constituted authority — either a judicial officer, the crown attorney, the police commission or the provincial or federal attorney-general. This permission whether by a court or otherwise, begins to look and feel very much like a search warrant — something that in relation to crimes defined by the Criminal Code is already covered by section 429, and which may be criminal procedure if it is not legislation in relation to criminal law under section 91 (27) of the

B.N.A. Act. In relation to provincial offences, a "surveillance warrant" could be validly created by a simple amendment to the Summary Convictions Act, and supported by provincial constitutional jurisdiction over the Ontario Provincial Police and over the enforcement of its own laws. The difficult question would arise if Ontario decided to prevent all forms of wiretapping and electronic surveillance by the Provincial Police, and then went on to make certain exceptions to this prohibited police conduct in favour of the detection of certain Criminal Code offences. Would a requirement that a "surveillance warrant" be obtained in some prescribed form in order to come within the exception to this general rule of police conduct be legislation in relation to criminal procedure? The writer has not been able to find the answer to this question, and it is one that must be answered. As long as the matter is one of behaviour of provincial police, it can be regulated by Ontario. Once it becomes criminal procedure, any purported regulation would, of course, be ultra vires.

A related question is whether the methods used by the R.C.M.P. can be controlled by the province as a matter of either the administration of justice in the province or the enforcement of a general rule of provincial law. Would the statute that said "no peace officer shall wiretap without a surveillance warrant" be construed as "no provincial peace officer"? Again, the writer does not know the answer to this question.¹⁷⁹

One of the primary considerations in controlling police conduct, as was pointed out at the beginning of this report, is to create safeguards for privacy that operate in terms of police values. The obvious way in which this can be done is through the use of the rules of evidence. Departure from the privacy protecting rules of conduct would make the evidence obtained through their violation inadmissible. At present, evidence obtained by surreptitious means has been held to be admissible, if relevant, in every criminal case in Canada and England that the writer has been able

179 The conduct of the R.C.M.P. may be subject to some provincial control. See their mandate in the R.C.M.P. Act, appended to this report as Annex N.

to find.¹⁸⁰ The rule is the same in civil cases as well.¹⁸¹

In the case of provincial offences, as well as in civil cases, the province would have no constitutional difficulties in excluding such evidence by an amendment to the provincial Evidence Act. This, however, would fail to cover the majority of cases of police surreptitious eavesdrop, which presumably involve Criminal Code offences. It is possible, but by no means certain, that a provincial exclusionary rule could be devised that would also cover prosecutions under the Criminal Code. Section 36 of the Canada Evidence Act reads as follows:

In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document subject to this and other Acts of the Parliament of Canada, apply to such proceedings.¹⁸²

Rules of evidence in criminal cases are clearly within "procedure in criminal matters."¹⁸³ It is not surprising, therefore, that provincial rules that speak directly to criminal proceedings have been held to be ultra vires.¹⁸⁴ It is

180 R. v. Steinberg, [1967] 3 C.C.C. 48 (Ont. C.A.) (concealed recording device planted by police while on accused's premises pursuant to a lawful search warrant. Section 1(a) and 2(d) of Canadian Bill of Rights do not prevent the admission of evidence obtained in this fashion); R. v. Foll, (1956) 117 C.C.C. 19 (Man. Q.B.) (Evidence obtained by tape recorder concealed by employer in his plant was admissible in a criminal prosecution); Silvestro v. The Queen, [1965] 2 C.C.C. 253 (Sup. Ct. Can.) (Recordings of incoming telephone calls obtained by police while on accused's premises pursuant to a lawful search warrant were admissible); R. v. Somerville, [1963] 3 C.C.C. 240 (Sask. C.A.) (Conviction for bribery and conspiracy upheld, based on a wire recording, obtained in undisclosed circumstances.) The English cases are to the same effect. The first such case to come before an appellate court was R. v. Maqsd Ali, [1965] 2 All E.R. 464 (C.C.A.) (Concealed tape recorder left by police in a room where two suspects were left alone after interrogation).

181 Hauer v. Hauer, Reid and Jubenville, (1959) 18 D.L.R. (2d) 742 (Sask. C.A.) (Tape recording proving wife's adultery obtained by a private investigator hired by husband and who lived in wife's house as a boarder held admissible.); Reliable Toy Co. Ltd. v. Collins, [1950] 4 D.L.R. 499 (Ont. C.A.) (Tape recordings of conversations between private investigator and defendant, and between plaintiff and defendant made by concealed tape recorder held to be admissible). England has the same rule; Harry Parker Ltd. v. Mason, [1940] 2 K.B. 590.

182 R.S.C., c.307, s.36 (1952).

183 Ex parte Murphy, R. v. Belisle and Moreau, unreported, N.B.C.A. 4 June, 1968.

184 Klein v. Bell [1955] S.C.R. 309. (B.C. rule of self-crimination clashed with federal rule.)

also not surprising that section 36 has given the courts considerable difficulty, and they have, where possible, avoided the constitutional problems that it poses.¹⁸⁵ Provincial rules of evidence have been used in prosecutions under the Criminal Code,¹⁸⁶ but it is by no means clear how far they can be extended for this purpose. In the latest case to deal with this problem, the Supreme Court of Canada said that section 110(5) of the Ontario Highway Traffic Act would be ultra vires if it purported to provide that statements made under the compulsion thereof would be inadmissible in criminal, as opposed to civil proceedings. Section 36 was viewed as not meaning that where a provincial law renders certain statements inadmissible in civil proceedings, they are also inadmissible in criminal proceedings. Parliament has the power to so enact, but section 36 is not susceptible to this interpretation.¹⁸⁷

The probable answer to the section 36 problem is that an amendment to the Ontario Evidence Act that made evidence obtained by certain forms of surreptitious eavesdrop inadmissible unless, e.g., permission of a court was obtained, would not be held to be applicable to criminal proceedings. But the point is not concluded by authority. Full investigation of the right to privacy should give detailed consideration to the possibilities that may exist under section 36 for exclusion of evidence obtained in violation of provincial

.185 E.g., The King v. Doull [1931] Ex. C.R. 159 (point not decided because privilege under provincial evidence act not seasonably invoked); A. G. Alberta v. Shepherd (1965) 53 W.W.R. (n.s.) 318 (Alta. C.A.) (point not decided because lawyer, not witness, claimed privilege under provincial act. Remanded to trial division). Ex parte Murphy, supra note 183 (provincial law respecting language to be used at trial not a rule relating to evidence.) The Royal Commission Inquiry Into Civil Rights (Ontario 1968) Report #1, Vol. 2, p.813 says: "It is a question for judicial determination as to how far s.36 would give power to the provinces to make alterations in the common law of evidence which would be applicable in the enforcement of federal law, e.g., the criminal law."

186 E.g., R. v. Pacific Bedding (1949) 95 C.C.C. 249 (B.C.C.A.).

187 Marshall v. The Queen (1960) 129 C.C.C. 232 (Sup. Ct. Can.).

laws relating to the protection of privacy.¹⁸⁸

Another problem that must be considered under this head is whether wiretapping or surreptitious electronic invasion of privacy should be a permissible mode of police investigation at all, and if so, under what circumstances. The Canadian Bar Association will vote in September, 1968 on a resolution to prohibit this activity by the police unless there is some form of judicial control and the circumstances are analogous to those in which a peace officer has the right to arrest without a warrant.¹⁸⁹ This is not as restrictive as the proposed federal bills mentioned earlier in this report which would limit this form of investigation to crimes which are punishable by imprisonment for ten years or more. Nor is it a very useful measuring stick in relation to the fifteen or so provincial statutes under which arrest without a warrant is authorized.¹⁹⁰

The writer's own views on this issue are that police wire-tapping and electronic surveillance should not be authorized for the investigation of any provincial offences, with the possible exception of the securities laws. The federal offences that could be investigated by these methods should be the very serious ones, denominated either individually, or by reference to the possible penalty. In addition, there should be a carefully controlled exception to the prohibition in the case of syndicated crime,¹⁹¹ and cases of national security.

188 A good place to start might be with S.G. Main, Q.C., of Main, Nugent & Babie, Barristers and Solicitors, 108 McLeod Bldg., Edmonton, Alberta. Mr. Main took the Shepherd case to the Alberta Court of Appeal, in which the court noted in its judgment the extensive argument on the section 36 point. His factum would undoubtedly contain all of the relevant authorities. In addition, he may have a brief on the law, and would also know of the subsequent disposition of the case, if and when the witness, not the lawyer, claimed the provincial privilege.

189 The proposed resolution is appended hereto as Annex O.

190 These are collected in the Royal Commission Inquiry Into Civil Rights (1968, Ontario) Report #1, Vol. 2, pp. 726-737.

191 "Syndicated" is not synonymous with "organized". All criminal activities are to some extent organized, but not all organized criminal activities are syndicated.

There should be authorization from some agency outside of the police structure. This should be either a court or the Attorney-General. Cogent arguments can be made for each. The Attorney-General is responsible to the legislature or to Parliament, and can be held answerable for his actions, which, of course, is not the case with a court. If a court is the selected agency, it should be a superior court rather than a magistrate or justice of the peace. The writer favours the authorization by the supreme court of a province, made pursuant to the application of the local crown attorney upon request by the police. The Attorney-General could still be required to lay before the legislature an annual report as to how often authorization was applied for, how often it was granted, etc.

The applicant should be required to show sufficient cause in detail before permission would be granted. Provision should be made for proper custody and disposition of evidence obtained. Time limits should be imposed. Any person wrongfully subjected to this type of surveillance should have a right of action against either the police or the crown attorney or both if the application was patently groundless or made in bad faith. Perhaps he should be informed after the surveillance has been terminated. The point is that if this sort of police activity is allowed, it should be subjected to the closest possible scrutiny with as many safeguards as possible, and with as much political visibility as can be built into the control system without endangering the effectiveness of the investigation. At present there are no controls in an area where strict controls are vital. This must not be allowed to continue.¹⁹²

Since much of this is either within federal jurisdiction, or in the vast foggy area between section 91 and section 92, the writer recommends that immediate liaison with the Attorney-General of Canada be established, for

192 Police use of this investigative technique was briefly touched upon in the Royal Commission Inquiry into Civil Rights. See Report #1, Vol. 2 pp. 738-39.

the joint solution of this problem.¹⁹³

Another problem under this head involves the use of evidence obtained by wiretapping or surreptitious electronic eavesdrop devices in civil cases. In the writer's opinion, evidence obtained by such means should be excluded by an amendment to the Ontario Evidence Act, even if it is relevant. Alternatively, it could still be admitted, with the proviso that the act of tendering such evidence to a court would be a prima facie invasion of privacy under the provincial civil tort action, even if the evidence itself is not of such a nature that it would constitute an invasion of privacy if it were obtained by any other means.

F. Creation of the offence of invasion of privacy; creation of the tort of invasion of privacy

As was discussed earlier in this report, the creation of this offence under provincial law appears to be well within provincial constitutional competence. In the opinion of the writer, it should be a specialized offence, applicable in the more serious cases of invasion of privacy. At a minimum, it should cover the use of wiretapping and surreptitious electronic eavesdropping devices in all circumstances, including the use of the concealed portable tape recorder. The offence of "Industrial Espionage" should be created and punished under this statute.¹⁹⁴ It could perhaps also cover the nonconsensual obtaining of certain personal records in situations not involving theft, personation or false pretences — for example, the photographing of an employee's medical records by an outside investigator. Likewise, the offence could also apply to control both the acquisition of certain "protected zone" information about individuals and the more unsavory methods of operation of certain private sector collectors in situations where unregulated collection and use of personal data presently poses an aggravated

193 Press reports indicate that the Attorney-General of Canada has recently stated that "Laws to enforce the right to privacy against intrusions like wiretapping were needed." London Free Press, p. 9, 26 August, 1968.

194 According to published reports, industrial espionage is an extremely serious problem in Ontario, especially in Toronto. See, e.g., the stories on industrial espionage in Toronto Telegram, June 1, 1964; also Toronto Life, December, 1967.

threat to privacy. Institutional dossier building for the purpose of disclosure to others could be made an offence, providing that a satisfactory definition of what a dossier is could be arrived at.

The writer sees the provincial offence suggested here as being complementary to the suggested invasion of privacy tort. This offence, along with specific regulation of the activity of private investigators, the police, certain commercial undertakings and some of the other measures suggested in this report could all combine to create a legislative code of privacy that would afford a measure of protection against the invasion of privacy that may not be attainable if only a civil remedy is created.

Of the fact that such a tort should be placed in the statutes of Ontario, there can be no doubt. The writer suggests that consideration be given to going farther than has been done in British Columbia by using the prima facie invasion of privacy and the reverse onus devices suggested above as means of controlling privacy-invading activities which in their totality pose a serious threat to privacy, but which may not be unreasonable vis-à-vis any particular individual. This would amount to a legislative declaration of the fact that certain activities of personal data collectors and information traffickers are contrary to the public policy of Ontario. A parallel can be found in United States, where, under the antitrust laws, any person injured by illegal corporate price-fixing may recover treble damages. Even though the injury to any given individual may be small, this device has proved to be a very effective way to control the larger aspects of an undoubted social and economic evil.

G. Creation of an independent agency with educational, persuasive, evaluative, investigatory, decisional, regulatory, reporting and coercive powers to protect and foster the right to privacy in all of its aspects

In supplement to some of the suggestions made above, or as an alternative thereto, the writer recommends that a full investigation be made into the possibility of creating a Privacy Commission or Ombudsman type agency, similar in conception to the Ontario Human Rights Commission.

Perhaps this task could be taken over by the Human Rights Commission, since it is already a going concern. Assigning this mission to an existing body would not only be more economical, but might also be more realistic in terms of the political limitations that exist when new departures are required. Privacy would then become just another human right afforded positive protection in Ontario.

By this point it should be clear that the privacy problems faced today are vast and intricate — almost like an inoperable cancer which has spread through and among all of the organs of the body politic. Even the best legislation may be too crude a tool with which to deal with the situation, both as it exists, and as it threatens to become. Some of the measures suggested in this report may be too draconian, and may create presently unpredictable social ills of a greater magnitude than the situation which they propose to correct. Others may not go far enough, or may prove to be unworkable as a practical matter. Designing a legislative programme that will correctly anticipate and regulate all of the evils inherent in the invasion of privacy without choking off the legitimate communication of information or unduly hampering valid social and economic mechanisms or inhibiting man's vital quest for scientific inquiry into the human condition may prove to be an almost impossible task.

For these reasons, an independent Privacy Ombudsman may be a very valuable tool. Basic norms of privacy could be set out in provincial legislation, with both civil and penal aspects, and the task of putting flesh on these bones assigned to this Commission. It could be given jurisdiction to inquire into invasion of privacy in both the public and the private sector. It could hear and investigate complaints from the public, and perhaps should have a self-initiated investigatory function as well. It could perform an educational function, both in relation to government and private collection, use and dissemination of personal data, and could encourage the self-regulatory development of privacy norms for inclusion in the ethical codes of professional societies, businesses, schools and all of the other organizations that require

and use personal data about individuals. It could be given the power to issue "cease and desist" orders in cases of serious violations of the right to privacy which could be entered and enforced in the same manner as the order of a superior court, either at the instance of the complainant or the Commission. A right to appeal to the courts could be built into the legislation creating this Commission, as a means of balancing the whole process. Perhaps no prosecutions under the invasion of privacy statute could be commenced without the recommendation of the Privacy Commission. It could function in such situations in the same manner as does the Ontario Human Rights Commission: receiving a complaint, finding the facts, and then working out a settlement which is aimed at both the adjustment of the grievance in the individual case and obtaining some sort of corrective action, either informal or by a consent order, in the data collection and use procedure of the offender which would guard against future abuses. It could also be given jurisdiction to impose fines and award compensatory damages. If the offender either refuses to conform, or persists in the invasion of privacy, or if the facts disclose a particularly flagrant violation of privacy, then the Commission could recommend prosecution.

The Privacy Commission should be required to make periodic reports to the legislature on its activities, and should recommend new legislation and regulations where its practical experience shows this to be necessary. It would therefore be an ongoing investigation into the problem of how to protect privacy in the province, functioning as a social laboratory for the creation of new checks and balances against technological and commercial innovations that result in an unwarranted diminution of privacy. As experience is gained in dealing with privacy problems, and as new manifestations of the invasion of the right to privacy appear, such a Commission could provide invaluable guidance to both the government and the public in terms of knowing what should be done and suggesting how to do it. It may be that we cannot afford to wait for the generation or more that it would take the courts to evolve an effective jurisprudence of privacy and that we are not wise enough to do it for them by detailed legislative schemes. If this is so, then

a Privacy Commission may well prove to be the answer.

H. The remainder of the twenty points

All of these are important and deserve extended comment which the present limitations of this report do not allow. It is hoped that the points that have not been discussed in detail are sufficiently self-explanatory to at least provide a starting place for future investigation and work in the field of protection of privacy. Some of these points might well be left for the consideration of the proposed Privacy Commission, as steps which experience indicates either should or should not be taken. An example might be the suggestion that contracts that have as their object the unwarranted invasion of privacy of a third party be made void ab initio.

Others might be investigated on their own merits, and made the subject of specific legislation. The establishment of rules, e.g., for the owners of hotels to prevent their complicity in schemes to "bug" certain rooms or to guide certain guests to "surveillance rooms" could be accomplished without much difficulty and without having to give extended consideration to the implications of social and economic cost.

All of the points raised are important, and it is hoped that the significance of those not elaborated upon will not be overlooked.

PART SIX: RECOMMENDATIONS FOR THE CONDUCT OF FURTHER STUDY

I. The proper scope of the study

Because the problem of privacy is so interwoven with the whole of the legal and social fabric, the results of any ill-conceived action may be as harmful as taking no action at all. There are no specialists in the law of privacy as there are in such areas as family law or landlord and tenant, and very few a priori solutions. Given this situation, the writer would like to quote and express agreement with these words of the Chairman of the New York Law Revision Commission:

The basis upon which a study is undertaken is that it is to provide the Commission with a thorough review of the problem, in all its varied and related aspects, so that a correct conclusion can be reached as to whether or not legislative action is required, and if such action is to be recommended, how it is to be formulated. Any study must include an analysis of the New York law, a comparison of it with the law in other jurisdictions, sometimes even including foreign law, and a consideration of the policy questions involved. Statutory as well as decisional law is to be examined, and the thinking of jurists, textwriters and eminent authorities consulted. All available pertinent legal literature is to be considered — treatises, periodicals, restatements, model or uniform laws, etc. The search for relevant authorities and the recognition of a sufficient quantum of authority is, of course, the professional responsibility of the researcher. Factual investigations are seldom called for, since the studies made by the Commission are legal studies. However, where factual data is needed, or where it may be deemed helpful to obtain the opinion of the Bar in specialized fields of practice, this may be done.¹⁹⁵

It is suggested that our thinking and our actions be no less comprehensive in relation to the protection of privacy than the standard approach taken in New York. This will take a considerable amount of time. Even this preliminary report, which only reflects the dimly perceived tip of the privacy iceberg, has taken two intensive months. But the outcome of a full study cannot help but influence the course of events in relation to the protection of privacy, not only in Canada, but in the entire common law world for years to come. This is well worth the time and effort required to do the job properly.

II. The alternatives as to how the job should be done

There are four basic routes to the creation of a new legislative programme.

195 MacDonald, Legal Research Translated Into Legislative Action (The New York Law Revision Commission, 1934-1963), 48 Cornell L.Q. 401, 424, (1963).

One is the Royal Commission or its equivalent, a specially-constituted Task Force with full powers under The Public Inquiries Act. The second is the Select Committee of the Legislature. The third is the Departmental Committee ad hoc. The fourth is the Law Reform Commission.

Of these four, the Royal Commission or the Task Force strikes the writer as the best vehicle for conducting the broad spectrum sort of inquiry that the topic requires. The terms of reference of such an investigation would in fact come very close to those assigned to the Royal Commission Inquiry into Civil Rights, under which the need was recognized for "continuing readjustments in the internal structure of society and the need to preserve and protect basic principles relating to the civil liberties, human rights, fundamental freedoms and privileges of the individual..."¹⁹⁶ The type of approach taken by this Royal Commission, with a mandate to inquire into the whole of the law and the whole of the society in Ontario is what should properly be done. If possible, the same Commission should be continued with a new appointment to undertake the definitive study that is needed for the protection of privacy, using the existing staff, offices, and research facilities.

The major drawback to this proposal is expense. The cost figures for the Royal Commission Inquiry into Civil Rights are not available to the writer, but it is probably a safe estimate that this form of study, in addition to being the most comprehensive approach to the problem, is also the most expensive. One suggestion for ameliorating the expense would be to have a Royal Commission or Task Force on Privacy sponsored jointly by both the province and by the federal government. This would allow not only cost-sharing, but would also provide the necessary coordination between both levels of government.

The problems inherent in the protection of privacy demand the attention of the closest approximation of a philosopher-king that is humanly attainable. The

196 Ontario Order-in-Council dated 21 May, 1964, creating the Royal Commission on Civil Rights.

Ontario Royal Commission on Civil Rights seems to the writer to be one of the few bodies that has ever been created that has approached these dimensions, and fortunately it still exists.

The select committee and the departmental inquiry ad hoc would be less expensive, but would have certain drawbacks. Traditionally, these methods have been used to inquire into defined areas, such as company law, securities legislation, taxation, etc. The use of the select committee may have the unfortunate result of placing the inquiry too close to the political arena in a problem area that requires a very firm foundation of dispassionate study and research. The problems of privacy, unlike those of the more traditional black letter areas of the law, are often inherently volatile. A select committee may tend to polarize along small letter liberal-conservative lines which could both hamper its effectiveness as an investigating body to the extent that this division is reflected in the political makeup of the legislature, and the effectiveness of the legislative and regulatory measures that it may recommend. This may not be the case, but it should be given some thought. If a select committee were struck, it would doubtless take more time to arrive at its conclusions than would a Royal Commission or a Task Force. The demands upon the attention of the legislators are many, and unless the work of such a committee is to be superficial, it must be prepared to meet for three or four years.

A departmental committee ad hoc is another vehicle for undertaking legislative study. However, the breadth of the privacy field is such that it encompasses areas of responsibility in all government departments, and for this reason it may be a misuse of the departmental committee format, and may lead to an unnecessary confining of the inquiry to try this method of approaching the problem. If any department of government were to conduct a privacy study, the logical choice would be that of the Attorney-General.

The Law Reform Commission is, in the opinion of the writer, the second best alternative after the Royal Commission or its equivalent. It may be the least expensive method of accomplishing the necessary study. It would be a monumental task, the successful completion of which would be comparable to the best accomplishment of any

other similar body in the common law world. The Commission's mandate is to reform the law, and in the area of privacy, reform is badly needed.

It is suggested that a full-time director be appointed for the project, with, say, five part-time specialists engaged on a continuing basis. The cost of such a programme, including administrative expense and research assistants would be roughly \$70,000 per year¹⁹⁷ and this would continue for about two years, and possibly longer. The size of the Commission effort would be at least as great as that required for the family law project. If possible, the director should be drawn from the ranks of the Commissioners, and should be expected to devote all of his working time to the successful discharge of the privacy study responsibilities.

At some time during the project it may be desirable to appoint the director as a commissioner under The Public Inquiries Act as a means of gathering data and obtaining an input of public opinion and information relating to the various private, commercial and professional practices with which this report has been concerned. However this decision can be left to the recommendation of the director at some time in the future, after sufficient basic research has been done to determine what he needs to know, from whom the information is available, and whether it can be obtained on an informal basis.

Again, after the project has completed some basic research, it may be a useful procedure for the director to recommend the establishment of government departmental committees to review internal procedures with respect to those governmental privacy problems identified by the initial study, with a feedback from these committees to the Law Reform Commission.

Because of the overwhelming public interest involved in this topic, it may be desirable for the completed work of the Law Reform Commission to be assigned to a select committee of the legislature, with public hearings around the province, as the

197 This estimate can be broken down into these rough figures: Full-time director, \$20,000; five part-time research specialists at \$4,000 each, \$20,000; research assistants as required, \$10,000; secretarial help and administrative costs, \$15,000; expenses, \$5,000.

final step before implementation of the Commission recommendations. This is again a decision that need not be taken now, but which would be well worth considering at some future date.

Like the Royal Commission or Task Force, the work of the Law Reform Commission could be a joint federal-provincial effort. Since no comparable body exists at the national level, some initiative in this direction should be considered at the outset by the Commission, not only as a means of solving this particular problem, or cutting down on expenses, but also as a valuable precedent for the reform of the law in the many other areas of overlap between federal and provincial jurisdictions. The federal government, as stated earlier, is planning to take steps for the protection of privacy, and could best coordinate its efforts with those of the provinces if it worked through the Law Reform Commission. As a matter of avoiding duplication of effort and achieving the most effective legislative programme for the protection of privacy and freedom on both jurisdictional levels, a jointly commissioned project under the aegis of the Ontario Law Reform Commission would seem to be a highly desirable thing. Without such cooperation, the federal legislation may have the effect of excluding much of the detailed regulation of those private and commercial activities that combine to create a serious threat to privacy and which can only be effectively controlled by the exercise of provincial jurisdiction.

PART SEVEN: ANNEXES

Relevant Extracts from The General Tariff of
The Bell Telephone Company of Canada
C.T.C. No. 6716

- Rule 9: The Company's equipment and wiring shall not be rearranged, disconnected, removed or otherwise interfered with, nor shall any equipment, apparatus, circuit or device which is not provided by the company be connected with, physically associated with, attached to, or used so as to operate in conjunction with the Company's equipment or wiring in any way, whether physically, by induction or otherwise, except where specified in the Tariffs of the Company or by special agreement. In the event of a breach of this rule, the Company may rectify any prohibited arrangement or suspend and/or terminate the service as provided in Rule 35.
- Item 485.3 Voice-recording equipment so connected [i.e. with dictation recording terminals provided with dial P.B.X. systems] is restricted to use with dial telephones of the customer's P.B.X. system, and with dial telephones of an associated dial P.B.X. system of the same customer that has no attendants' positions, and is connected with the main system by tie trunks. The use of voice recording equipment otherwise is governed by Item 2260.
- Item 2260. Voice Recording Equipment.
1. Voice-Recording equipment is apparatus for recording speech or other sounds for subsequent reproduction.
 2. (a) Voice-recording equipment provided by a customer may be used with the facilities of the Company only when connected thereto through recorder-connector equipment provided by the Company, except when used with a dial P.B.X. dictation-recording terminal as specified in Item 485. The recorder-connector equipment contains a device which automatically produces a distinctive recorder tone that is repeated at intervals of approximately 15 seconds while the voice-recording equipment is in use, except that recorder-connector equipment without the tone device may be used at the customer's option on fire and police emergency services, intercommunicating circuits (Item 1830) and emergency recording and alerting systems (Item 2280.)
 - (b) Permanent connection of voice-recording equipment is to be made only through recorder-connector equipment provided, installed and maintained by the Company.
 - (c) Temporary connection of voice-recording equipment ... may be made for a trial or demonstration through portable recorder-connector equipment provided by a recorder manufacturer or his agent, subject to the condition that the recorder-connector equipment is provided and maintained by the Company and is connected with the telephone line through one or more jacks installed on the line by the Company for that purpose.

Telephone Act, R.S.O. (1960) c. 394, ss. 110(1), 112, 113

110. (1) Every person who uses or interferes with or permits to be used or interfered with any telephone instrument, wiring or other equipment so as to injure or damage it or prevent the proper use of the circuit to which the telephone instrument, wiring or other equipment is connected is guilty of an offence and on summary conviction is liable to a fine of not more than \$50 for each offence.
112. Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty of an offence and on summary conviction is liable to a fine of not more than \$50 or to imprisonment for a term of not more than thirty days, or to both.
113. Every person who, when using a telephone instrument or conversing over a telephone line, whether the telephone instrument or line is owned by a telephone system under the jurisdiction of the Legislature or not, uses indecent, obscene, blasphemous or grossly insulting language is guilty of an offence and on summary conviction is liable to a fine of not more than \$50 or to imprisonment for a term of not more than thirty days, or to both.

Summary Convictions Act, R.S.O. (1960) c. 387
ss. 2(a), 2(b) and 14(1)

2. Subject to any special provision otherwise enacted with respect to such offence, act or matter, this Act applies to,

- (a) every case in which any person commits, or is suspected of having committed, any offence or act over which the Legislature has legislative authority and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment;
- (b) every case in which an information is laid before a justice in relation to any matter over which the Legislature has legislative authority and with respect to which the justice has authority by law to make an order for the payment of money or otherwise.

14. (1) Where a justice is satisfied by information upon oath (Form 1) that there is reasonable ground for believing that there is in any building, receptacle or place,

- (a) anything upon or in respect of which an offence against a statute of Ontario has been or is suspected to have been committed; or
- (b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence,

he may at any time issue a warrant (Form 2) under his hand authorizing a constable or other person named therein to search such building, receptacle or place for any such thing, and to seize and carry it before the justice issuing the warrant or some other justice for the same territorial division to be by him dealt with according to law.

The Statistics Act, 1962-63, relevant extracts from
ss. 2, 3, 4, 6, 7, 8, 9

2. (1) Subject to subsections 3 and 4, the Lieutenant Governor in Council may authorize the minister of any department of government,
 - (a) to enter into an agreement with the Government of Canada or the government of any province in Canada or any agency of any such government to provide for an exchange or joint collection of statistical information;
 - (b) to collect, compile, analyse and publish statistical information;
 - (c) to collect statistical information jointly with the minister of any other department of government.

3. The questions in any questionnaire authorized under this Act shall be accurately and truthfully answered by each person to whom the questionnaire is directed and shall be returned to the minister who issued it.

4. (1) No person shall collect, compile, analyse or publish statistical information under this Act until he takes and subscribes before his minister, his deputy minister, or a person designated in writing by either of them, an oath of office and secrecy in the following form:

I, , do swear that I will faithfully discharge my duties under The Statistics Act, 1962-63 and, except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my duties under The Statistics Act, 1962-63. So help me God.

- (2) Subject to section 6, no public servant having knowledge of the answers to questions asked in a questionnaire under this Act shall disclose or give to any person any information or document with respect to such answers without the written permission of his minister, and, except where statistical information is collected jointly under this Act, such permission shall be limited to the disclosing or giving of information or documents to public servants in the minister's department or in prosecutions instituted for offences against this Act.

- (3) Notwithstanding anything in this Act, no minister or public servant shall, in any way, use the answers to questions asked in a questionnaire authorized under this Act for any purpose other than the purposes of this Act.

6. (1) Where a person who has answered a question in a questionnaire consents in writing, a minister may give permission to a public servant in his department who has knowledge of the answer to disclose or give the answer to one or more public servants in another department.

7. Any person who,

- (a) being required under the authority of this Act to answer any question in a questionnaire and to return it to the minister who issued it, fails to answer, without lawful excuse, any such question or to return the questionnaire within the time prescribed; or
- (b) wilfully gives a false answer to any such question,

is, for every day of such failure or for every false answer, guilty of an offence and on summary conviction is liable to a fine of not more than \$100 or to imprisonment for a term of not more than three months, or to both fine and imprisonment.

8. Any person who,

- (a) in the pretended performance of his duties under this Act, obtains or seeks to obtain information that he is not duly authorized to obtain; or
- (b) discloses or gives any information or document to any person in contravention of subsection 2 of section 4,

is guilty of an offence and on summary conviction is liable to a fine of not more than \$300 or to imprisonment for a term of not more than six months, or to both fine and imprisonment.

9. Any person who,

- (a) discloses or gives any information or document respecting an answer to a question in a questionnaire authorized under this Act to any person with the intent that the market value of a product is thereby affected; or
- (b) uses an answer in any such questionnaire for the purpose of speculating in a product,

is guilty of an offence and on summary conviction is liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than five years, or to both fine and imprisonment.

Manitoba Telephones Act
Stat. Man. (1955) c. 76, ss. 36 and 37

36. No person shall fix to any telephone equipment of the commission any attachment or device intended to be used therewith or in connection therewith if, in the opinion of the commission, the attachment or device will injuriously affect the telephone equipment or the operating efficiency of telephone lines or equipment; and any such attachment or device shall, for the purpose of this section, be considered to be affixed to equipment if it is attached or affixed thereto or placed on, over, under, or adjacent to, any such equipment in such a manner as to be able to be used in connection therewith. New.

37. (1) The commission may sell, rent, or otherwise supply, to any subscriber, equipment known as recorder-connector equipment, for use in connecting telephone equipment installed by the commission with recording equipment of the subscriber to be used in recording messages transmitted along, over, or through, the lines or wires of the subscriber.

(2) No person in the province shall use any recording equipment, to record messages transmitted along, over, or through the lines of wires of the system of the commission unless the recording equipment is connected to telephone equipment installed by the commission for a subscriber, and is so connected by means of recorder-connector equipment supplied by the commission which emits a signal when a message is being recorded.

(3) Evidence of the finding of recording equipment, any part of which is either attached to, or placed on, over, under, or adjacent to telephone equipment in such a manner that recording can be carried on through or by means of the recording equipment, shall, in any prosecution under this section, be admissible in evidence as *prima facie* proof that the recording equipment was being used to record messages in contravention of this section.

(4) Where any person contravenes subsection (2), the commission may forthwith either disconnect the telephone service or remove the telephone equipment of that person, or disconnect the telephone service or remove the telephone equipment of the person whose telephone equipment has been used for that purpose.

(5) Except in the case of employees of the commission using such equipment as the commission may supply to its employees for service reasons or purposes, no person in the province shall use any equipment, device, apparatus, or contrivance, for the purpose of intercepting and listening to messages passing along, over, or through, the lines or wires of the system of the commission whether the equipment, device, apparatus, or contrivance works by being directly attached to the wires or any other part of the lines or equipment of the system of the commission or by induction, or by any other means.

(6) Evidence of the possession by any person of any equipment, device, apparatus, or contrivance, capable of being used for intercepting and listening to messages passing along, over, or through, the telephone lines or wires of the system of the commission, or under such circumstances that it is capable of being so used, shall, in any prosecution under this section be admissible as prima facie proof that the equipment, device, apparatus, or contrivance, was being used for that purpose.

(7) Any person who violates subsection (2) is guilty of an offence and liable, on summary conviction, to a fine of not less than one hundred dollars or more than one thousand dollars and in default of payment, to imprisonment for a term not exceeding three months or, to imprisonment for a term not exceeding three months without the option of a fine, or to both such a fine and such an imprisonment.

(8) Any person who violates subsection (5) is guilty of an offence and liable, on summary conviction, to a fine of not less than two hundred dollars or more than two thousand dollars, and in default of payment, to imprisonment for a term not exceeding six months without the option of a fine, or to both such fine and such an imprisonment. New.

Rural Telephone Act
R.S.N.S. (1954) c.255, ss.44 and 45

44. (1) No person shall lay or cause to be laid any conductor which shall communicate with any conductor belonging to any company without the consent of such company, and no person shall in any way obtain, utilize, or use the wires or electrical current or service of any company or attach any instrument or apparatus to any conductor or instrument of any company without the consent of such company.
- (2) If any person wilfully or maliciously violates any of the provisions of this Section, such person shall be liable to a penalty of one hundred dollars, and to a further penalty of forty dollars for every day during which such violation continues. 1939, c.6, s.41.
45. (1) No person shall break, interfere with, molest, injure, or destroy any instrument, wire, fuse, fitting, post, line material or property of or belonging to any company; or in any way obstruct, disturb or impede the action, operation or working of any line or instrument of any company, or in any way obstruct, impede or interfere with any workmen or employee of any company or an inspector or plant superintendent or linemen in the performance of their duties.
- (2) If any person wilfully or maliciously violates any of the provisions of this Section such person shall be liable to a penalty not exceeding forty dollars or to imprisonment for a term not exceeding one month, or to both. 1939, c.6, s.42; 1949, c.49, s.13.

Telephone Company Act
R.S.Q. (1941) c. 298 ss. 3 and 4

3. Every operator or other person in the employ of a telephone company, who listens to or acquires knowledge of any conversation or message that is being carried on by means of the apparatus of such company. and who except when lawfully authorized or directed so to do, divulges the purport or substance of such conversation or message, shall be liable to a penalty of one hundred dollars recoverable by suit in a court of competent jurisdiction by any person suing therefore in his own name, or, in default of payment of such penalty, to imprisonment for a term of not more than three months, or both, in the discretion of the court before which the conviction is had.
4. Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system, not addressed to or intended for such person, and divulges the same or the purport of substance thereof, except when lawfully authorized or directed so to do, shall be liable to the same penalty and imprisonment as are enacted above."

Extracts from City of Edmonton Telephone by-law no. 2295 as amended by By-law 2315, dated 26 November, 1962 and By-law 2633, dated 26 January , 1965:

"NOW THEREFORE The Municipal Council of the City of Edmonton duly assembled enacts that By-law No. 2295 is hereby amended in the following respects:

1. By adding as Section 13 the following:

- 13 (a) Without the permission of the Superintendent, no subscriber shall, or permit any other person to, remove, alter or make any attachment to any telephone instrument, equipment, connecting line or directory, supplied by the system for service to, or the use of, the subscriber or use any telephone equipment or service apparatus at any place other than that at which the System has placed or installed it or rearrange, disconnect, remove, or otherwise interfere with any equipment or wiring belonging to the System or attach to or connect with the System's equipment, apparatus, wiring or directory, any instrument, device, speaker, receiver, writing, or printing, whether telephone or not; or operate in conjunction with the System's equipment, apparatus, wiring or directory, whether by induction or physical connection, any instrument, device, speaker, receiver, writing or printing, whether telephonic or not.
- (b) No person shall remove, alter or make any attachment to any telephone instruments, equipment or connecting lines supplied by the System except a police officer when so authorized by law.

2. By adding as Section 41 the following:

- 41 Notwithstanding Section 39 and 40 the attachment of a recording device to the telephone equipment without a beep tone device shall be permitted by the Superintendent if the Chief Constable of the City of Edmonton produces to him legal authority so to do".

Statutory Declaration Furnished by Police
of the City of Edmonton to a Magistrate
for the Purpose of Obtaining Authorization
to Record Telephone Conversations:

CANADA) In the matter of and
PROVINCE OF ALBERTA)
TO WIT:) In the matter of Section 41 of City
of Edmonton Bylaw 2295, as amended.

STATUTORY DECLARATION

I, Staff Inspector _____, for and on behalf of
The Chief Constable of the City of Edmonton Police Department in the
Province of Alberta, do solemnly declare:

1. That I have reasonable grounds for believing and do believe that the
Premises commonly known as _____
is occupied by or under the control of one _____
and that there is installed in the said premises a telephone, the
property of the City of Edmonton Telephone System (hereinafter called
"the System") listed in the records of the said system as number
_____ in the name of one _____
and that the said telephone is being used for the perpetration of or
the furtherance of criminal activities, to wit:
- and my grounds for so believing are that I am in possession of
information given to me in confidence which has been confirmed in
part by observations and investigations which I have made;
2. Conventional enquiries made to date have not produced the desired
result;
3. That I make this Statutory Declaration pursuant to Section 41 of
Bylaw 2295 of the City of Edmonton, as amended, to obtain legal
authority to attach a recording device to the telephone equipment
connected to the telephone listed in the records of the said System
as number _____ and that such recording device remain attached
to the telephone equipment of the said System for a period of
_____ days from the date of the granting of the said legal authority.

APPROVED:

M.F.E. ANTHONY
Chief Constable.

AND I make this solemn declaration conscientiously believing it to be
true, and knowing that it is of the same force and effect as if made under
oath, and by virtue of the Canada Evidence Act.

DECLARED before me at the city of _____)
Edmonton, in the Province of Alberta, _____)
this _____ day of _____ A.D. 19____.)

A Magistrate in and for the Province of Alberta.

Magistrate's Authorization to City of Edmonton Police
to Record Telephone Conversations:

CANADA)	In the matter of	and
)		
PROVINCE OF ALBERTA)	In the matter of Section 41 of City of	
)		
TO WIT:)	Edmonton By-law 2295, as amended.	

A U T H O R I Z A T I O N

WHEREAS, information of Oath has been produced to me that there are reasonable grounds for believing that the premises commonly known as _____ is occupied by, or under the control of one _____ and that there is installed in the said premises a telephone, the property of the City of Edmonton Telephone System (hereinafter called "the System") listed in the records of the said system as number _____ in the name of one _____ and that the said telephone is being used for the perpetration of or the furtherance of criminal activities, to wit:

and whereas conventional police enquiries have to date not produced the desired result:

NOW THEREFORE authority is hereby granted, to the Chief Constable of the City of Edmonton, to attach to the above described number of the System, a recording devise without a beep tone devise, in accordance with the said Bylaw;

AND FOR SO DOING, this shall be sufficient warrant and authority to the Superintendent of the System.

Dated at the City of Edmonton, Province of Alberta this _____ day of _____ 19____.

Magistrate in and for the
Province of Alberta.

FOR REPORT

Certified correct as amended in Committee of the Whole on the
15th day of March, 1968.

I. M. HORNE, *Law Clerk.*

HON. ATTORNEY-GENERAL.

BILL

No. 1]

[1968

An Act for the Protection of Personal Privacy

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of British Columbia, enacts
as follows:-

Short title.

1. This Act may be cited as the *Privacy Act*.

Violation of
privacy
actionable.

2. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

(3) Privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass; but nothing in this subsection shall be construed as restricting the generality of subsections (1) and (2).

Exceptions.

3. (1) An act or conduct is not a violation of privacy where

- (a) it is consented to by some person entitled to consent;
- (b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- (c) the act or conduct was authorized or required by or under a law in force in the Province or by a Court or any process of a Court; or
- (d) the act or conduct was that of
 - (i) a peace officer acting in the course of his duty for the prevention, discovery, or investigation of crime or of the discovery or apprehension of the perpetrators of a crime; or
 - (ii) a public officer engaged in an investigation in the course of his duty under a law in force in the Province, and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

(2) A publication of any matter is not a violation of privacy if

- (a) the matter published was of public interest or was fair comment on a matter of public interest; or
- (b) the publication was, in accordance with the rules of law relating to defamation, privileged;

but this subsection does not extend to any other act or conduct whereby the matter published was obtained if such other act or conduct was itself a violation of privacy.

(3) In this section,

“Court” includes any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence; and

“crime” includes any offence against a law of the Province.

Unauthorized use of name or portrait of another for advertising property or services actionable.

4. (1) It is a tort, actionable without proof of damage, for a person to make use of the name or portrait of another for the purpose of advertising or promoting the sale of, or any other trading in, any property or services unless that other, or a person entitled to consent on his behalf, consents to such use for that purpose.

(2) A person is not liable to another for the use, for the purposes aforesaid, of a name identical with, or so similar as to be capable of being mistaken for, that of the other, unless the Court is satisfied

(a) that the defendant specifically intended to refer to the plaintiff or to exploit his name or reputation; or

(b) that, either on the same occasion or on some other occasion in the course of a programme of advertisement or promotion, the name was connected, expressly or impliedly, with other material or details sufficient to distinguish the plaintiff, to the public at large or to the members of the community in which he lives or works, from others of the same name.

(3) A person is not liable to another for the use, for the purposes aforesaid, of his portrait in a picture of a group or gathering, unless

(a) the plaintiff is identified by name or description, or his presence is emphasized, whether by the composition of the picture or otherwise; or

(b) the plaintiff is recognizable and the defendant, by using the picture, intended to exploit the name or reputation of the plaintiff.

(4) Without prejudice to the requirements of any other case,

(a) in order to render another liable for using his name or portrait for the purposes of advertising or promoting the sale of a newspaper or other publication, or the services of a broadcasting undertaking, it is necessary for the plaintiff to establish that his name or portrait was used specifically in connection with material relating to the readership, circulation, or other qualities of the newspaper or other publication, or to the audience, services, or other qualities of the broadcasting undertaking, as the case may be; and

(b) in order to render another liable for using his name or portrait for the purposes of advertising or promoting the sale of any goods or services on account of the use of the name or portrait of the other in a radio or television programme relating to

current or historical events or affairs, or other matters of public interest, which is sponsored or promoted by or on behalf of the makers, distributors, vendors, or suppliers of the goods or services, it is necessary for the plaintiff to establish that his name or portrait was used specifically in connection with material relating to the goods or services, or to the manufacturers, distributors, vendors, or suppliers thereof.

(5) In this section, "portrait" means any likeness, still or moving, and includes a likeness of another deliberately disguised to resemble the plaintiff, and a caricature.

Jurisdiction.

5. Notwithstanding anything contained in any other Act, an action pursuant to this Act shall be heard and determined by the Supreme Court.

Limitation.

6. An action pursuant to this Act shall be commenced within two years next after the cause of action, and not after.

**Action does
not survive
death.**

7. A right of action for a violation of privacy, or the unauthorized use of the name or portrait of another for the purposes aforesaid, and any such action, is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority.

Bill C-103

1964

1. The Criminal Code is amended by inserting therein immediately after section 384, the following section:

"384A. (1) Every one, not being a sender or receiver of a telephone or telegraph communication who wilfully, and by means of instrument, intercepts, overhears or records a telephone or telegraph communication is guilty of

- (a) an indictable offence, and is liable to imprisonment for two years, or
- (b) an offence punishable on summary conviction.

(2) This section shall not apply to any person acting pursuant to an Order granted pursuant to section 429A or to any person acting in the course of their normal employment as an employee or officer of a telephone or telegraph company."

2. The said Act is amended by inserting therein immediately after section 429, the following sections:

"429A. A judge of a superior court of criminal jurisdiction who is satisfied by information upon oath, either in Form 1A or upon examination under oath of a peace officer and any other witnesses he may produce that there is reasonable grounds to believe that evidence of an indictable offence punishable by imprisonment of ten years or more, may be obtained by the interception, overhearing or recording of telegraphic or telephonic communications, may at any time issue an Order under his hand authorizing a person or persons named therein for the interception, overhearing or recording of telegraphic or telephonic communications, and the said Order shall identify a particular telephone number or telegraph line and the person or persons whose communications are to be intercepted, overheard or recorded, and the purpose of such interceptions or recordings, and the said Order shall be effective for the time specified therein, but not for a period of more than one month unless extended or renewed by the judge who signed and issued the original Order, upon satisfying himself that such extension or renewal is in the public interest.

429B. Every one, except in any trial, who wilfully disclosed to any person other than the telephone or telegraph company whose facilities are involved, or to the Attorney General or his agents, or the person making application for an Order pursuant to section 429A, any information concerning the application for the granting or denial of an Order pursuant to section 429A, or the identity of the person or persons whose communications, conversations, or discussions are the subject of an Order granted pursuant to Section 429A shall be guilty of an offence punishable on summary conviction".

3. The said Act is amended by inserting therein immediately after Form 5, the following Form:

"FORM 1A
INFORMATION

CANADA))

PROVINCE OF)

This is the informant of AB of

The informant says that (describe telephone number or telegraph line and person or persons whose communications are to be intercepted, overheard, or recorded, and the purpose of such interception or recording) and that he has reasonable grounds for believing that evidence of the offence of (describe offence) may be obtained by such interception (here add the grounds of belief, whatever they may be).

WHEREFORE the informant prays that an Order may be granted to (here describe person or persons to be granted Order) to intercept, overhear and record (here describe the telephone number or telephone line and person or persons whose communications are to be intercepted, overheard and recorded for a period of days commencing on the day of and ending on the day of

SWORN BEFORE ME)
)
this day of)
) (Signature of Informant)
)

A Justice of the Peace in and for "

Bill C-45

1966

1. The Criminal Code is amended by inserting therein immediately after section 394, the following section:

"384A, (1) Everyone, not being the intended receiver of a private communication, who wilfully, and by means of instrument, intercepts, overhears or records a private communication is guilty of

- (a) an indictable offence, and is liable to imprisonment for two years, or
- (b) an offence punishable on summary conviction.

(2) This section shall not apply to any person acting pursuant to an Order granted pursuant to section 429A or to any person acting in the course of their normal employment as an employee or officer of a telephone or telegraph company."

2. The said Act is amended by inserting therein immediately after section 429, the following sections:

"429A. A judge of a superior court of criminal jurisdiction who is satisfied by information upon oath, either in Form 1A or upon examination under oath of a peace officer and any other witnesses he may produce that there is reasonable grounds to believe that evidence of an indictable offence punishable by imprisonment of ten years or more, may be obtained by the interception, overhearing or recording of private communications, may at any time issue an Order under his hand authorizing a person or persons named therein for the interception, over-hearing or recording of private communications, and the said Order shall identify a particular telephone number of telegraph line (when applicable) and the person or persons whose communications are to be intercepted, overheard or recorded, and the purpose of such interceptions or recordings, and the said Order shall be effective for the time specified therein, but not for a period of more than one month unless extended or renewed by the judge who signed and issued the original Order, upon satisfying himself that such extension or renewal is in the public interest.

"429B. Everyone, except in any trial, who wilfully discloses to any person other than the telephone or telegraph company whose facilities are involved, or the Attorney General or his agents, or the person making application for an Order pursuant to section 429A, any information concerning the application for the granting or denial of an Order pursuant to section 429A, or the identity of the person or persons whose communications, conversations or discussions are the subject of an Order granted pursuant to section 429A shall be guilty of an offence punishable on summary conviction."

Bill C-19

1967

1. This Act may be cited as the "Right of Privacy Act of 1967".
2. (a) In this Act,
 - (a) "eavesdropping" means surreptitiously listening to, monitoring, transmitting, amplifying or recording a private conversation;
 - (b) "interception" means the act of acquiring all or any part of any wire communication from the facility transmitting the communication through use of any electronic, mechanical, or other device;
 - (c) "wire communication" means any communication made in whole or in part by aid of wire, cable, or other connection of the same nature.
3. (1) Except as otherwise specifically provided by this Act, it shall be unlawful for any person to
 - (a) wilfully intercept or attempt to intercept or procure any other person to intercept or attempt to intercept any wire communication without the consent of at least one sender or receiver of such communication; or
 - (b) wilfully disclose or attempt to disclose, or use or attempt to use, any information, knowing or having reason to know that such information was obtained in violation of paragraph (a) of this subsection.

(2) Every one who fails to comply with the provisions of subsection (1) of this section is guilty of an indictable offence punishable on summary conviction and is liable to a fine of five hundred dollars or to a term of imprisonment of three months or both fine and imprisonment.
4. (1) Except as otherwise specifically provided by this Act, it shall be unlawful for any person to
 - (a) wilfully use or attempt to use any electronic, mechanical or other device for the purpose of eavesdropping without the consent of at least one party to a conversation; or
 - (b) to wilfully disclose or attempt to disclose or to use, or attempt to use any information, knowing or having reason to know that such information was obtained in violation of paragraph (a) of this subsection.

(2) Every one who fails to comply with the provisions of subsection (1) of this section is guilty of an indictable offence or an offence punishable on summary conviction and is liable to a fine of five hundred dollars or to a term of imprisonment of three months or to both fine and imprisonment.
5. It shall not be unlawful under this Act for an operator of a switchboard, or an officer, agent, or employee of any communications common carrier, whose facilities are used in the transmission of a wire communication to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident of the rendition of service.

6. Sections 3 and 4 of this Act shall not apply where a person is duly authorized in writing by a judge of a Superior Court of criminal jurisdiction to conduct a search or investigation, at the request of the Minister of Justice of Canada, in cases affecting the national security of Canada.
7. Sections 3 and 4 of this Act shall not apply in the case of a peace officer or other person acting in the course of his duties and duly authorized in writing by a Justice of the Peace or a Magistrate to conduct a search or investigation for the purpose of the administration of justice, at the request of the Attorney General of the province concerned.

BILL

No. 81 of 1965.

An Act to prohibit Unauthorized Tapping of Telephone Lines and Unauthorized Recording of Telephone Conversations.

[Assented to 1965.]

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Short title 1. This Act may be cited as *The Wire Tapping Prevention Act, 1965*.

Interpre- 2. In this Act:

"corporation" 1. "corporation" means Saskatchewan Government Telephones, a rural telephone company or a telephone system constructed, operated and controlled by any person pursuant to the law of Saskatchewan;

"judge" 2. "judge" means a judge of the Court of Queen's Bench or of the district court;

"peace officer" 3. "peace officer" means a police officer, police constable, constable or other person employed for the preservation and maintenance of the public peace.

Attachments to telephone equipment prohibited 3.—(1) Subject to any order issued under section 11, no person shall affix to telephone equipment of the corporation any attachment or device that will, in the opinion of the corporation, injuriously affect the telephone equipment or the operating efficiency of any telephone lines or equipment.

(2) For the purpose of subsection (1), an attachment or device shall be deemed to be affixed to telephone equipment if it is attached or affixed thereto or placed

WIRE TAPPING PREVENTION

on, over, under or adjacent to the telephone equipment in such a manner that it can be used in connection therewith.

(3) A person who violates subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding \$100, and in default of payment to imprisonment for a term not exceeding ten days.

Power to
supply
recording
equipment to
subscribers

4. The corporation may sell, rent or otherwise supply, to any subscriber, equipment known as recorder-connector equipment, for use in connecting telephone equipment installed by the corporation with recording equipment of the subscriber to be used in recording messages transmitted along, over or through the lines or wires of the subscriber.

Limitation
and use of
recording
equipment

5. Subject to any order issued under section 11, no person shall use recording equipment for the purpose of recording messages transmitted along, over or through the lines or wires of the system of the corporation unless the recording equipment is connected to telephone equipment installed by the corporation for a subscriber, and is so connected by means of recorder-connector equipment, supplied by the corporation, that emits a clearly audible signal when a message is being recorded.

Penalty for
violation of
section 5

6. A person who violates section 5 is guilty of an offence and liable on summary conviction to a fine of not less than \$100 nor more than \$1,000, and in default of payment to imprisonment for a term not exceeding three months, or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

Prohibition
of use of
listening
devices

7.—(1) Subject to any order issued under section 11 and to subsection (2) of this section, no person shall use any equipment, device, apparatus or contrivance, for the purpose of intercepting and listening to messages passing along, over or through the lines or wires of the system of the corporation whether the equipment, device, apparatus or contrivance works by being directly attached to the wires or any other part of the lines or

WIRE TAPPING PREVENTION

3

equipment of the system of the corporation, or by induction or any other means.

(2) Subsection (1) does not apply in the case of officers or employees of the corporation using such equipment as the corporation may supply to its officers or employees for service reasons or control purposes.

Penalty for
violation of
section 7

8. A person who violates section 7 is guilty of an offence and liable on summary conviction to a fine of not less than \$200 nor more than \$2,000, and in default of payment to imprisonment for a term not exceeding six months, or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

Evidence of
recording of
messages

9. Evidence of the finding of recording equipment, any part of which is either attached to, or placed on, over, under or adjacent to telephone equipment in such a manner that recording can be carried on through or by means of the recording equipment, shall, in any prosecution under this Act, be admissible in evidence as *prima facie* proof that the recording equipment was being used to record messages in contravention of this Act.

Evidence of
use of
listening
devices

10. Evidence of the possession by any person of any equipment, device, apparatus or contrivance, capable of being used for intercepting and listening to messages passing along, over or through the telephone lines or wires of the system of the corporation, or under such circumstances that it is capable of being so used, shall, in any prosecution under this Act be admissible as *prima facie* proof that the equipment, device, apparatus or contrivance, was being used for that purpose.

Order auth-
orizing inter-
ception and
recording of
messages

11.—(1) A judge who is satisfied, by affidavit of a peace officer or upon examination under oath of a peace officer and such other witnesses as may be produced, that there is reasonable ground to believe that evidence of an offence under the *Criminal Code*, the *Narcotic Control Act* (Canada), the *Juvenile Delinquents Act* (Canada) or *The Securities Act, 1954*, of Saskatchewan may be obtained by the interception, overhearing or recording of telephonic communications, may, at any

WIRE TAPPING PREVENTION

time upon application *ex parte*, issue an order under his hand authorizing a person or persons named therein to take steps to intercept, overhear or record telephonic communications.

(2) An order issued under subsection (1) shall identify a particular telephone number or numbers or the person or persons whose communications with anyone are to be intercepted, overheard or recorded, and the purpose of such interceptions or recordings, and the order shall be effective for the period of time specified therein, but not for a period of more than one month unless extended or renewed by a judge, upon satisfying himself that such extension or renewal is in the public interest.

(3) Every person, except in a trial, who wilfully discloses to a person, other than the corporation whose facilities are involved or the employees of the corporation who are involved, or the Attorney General or his agents, or a peace officer, or the person making the application for the order, any information concerning the application for the granting or denial of an order under this section, or the identity of the persons whose communications, conversations or discussions are the subject of an order or application or the telephone number or numbers involved, is guilty of an offence.

(4) A copy of every order made under subsection (1) shall be served on the manager, district superintendent or person in charge of the telephone equipment affected by the order, and no action to intercept, overhear or record telephonic communications under the order shall be taken except under the direction of the corporation, and the corporation shall render such assistance as may be necessary to carry out the interception, overhearing or recording authorized by the order.

(5) The police force or municipality, whose representative has obtained an order under subsection (1), shall reimburse the corporation for any expenses incurred by it in enabling the interception, overhearing or recording authorized to be made under this section.

WIRE TAPPING PREVENTION

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(6) A person who violates subsection (3) is guilty of an offence and liable on summary conviction to a fine of not less than \$200 nor more than \$2,000, and in default of payment to imprisonment for a term not exceeding six months, or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

Non-application
of Act

12. Nothing in this Act prohibits the use of a party line, telephone extension apparatus or mechanical answering equipment that is supplied or installed by the corporation at the request of and for the purpose of providing service to a telephone subscriber, provided that such line, apparatus or equipment is not installed for the purpose of intercepting and listening to any conversation or message without the knowledge of any of the persons engaged in the conversation or in sending or receiving the message.

Administration
of Act

13. This Act shall be administered by the Department of the Attorney General.

Coming
into force

14. This Act shall come into force on the day of assent.

Extracts from the Royal Canadian Mounted Police Act, S.C. c. 54 (1959)

18. It is the duty of members of the Force who are peace officers, subject to the orders of the Commissioner
- (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others ...
 - (b) to execute all warrants, and perform all duties and services in relation thereto that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers ...

The Canadian Bar Association

Room 320, 90 Sparks St., Ottawa 4, Canada

I M P O R T A N T N O T I C E

Proposed Resolution re Electronic Eavesdropping

* * * * *

The following resolution was referred by the 1967 Annual Meeting in Quebec to the 1968 Annual Meeting in Vancouver. It will be considered at a General Meeting of Members to be held in the Hotel Vancouver, Vancouver, B.C., on Monday, September 2nd, 1968, commencing at 2.00 o'clock in the afternoon.

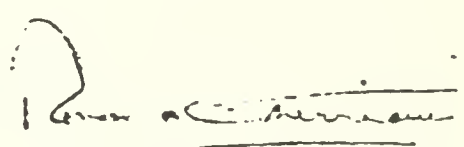
The resolution reads as follows:

"BE IT RESOLVED:

That the Canadian Government be requested to enact legislation to the effect that:

- (1) All electronic eavesdropping be made a criminal offence with the proviso that electronic eavesdropping may be employed by law enforcement agencies under judicial control.
- (2) Electronic eavesdropping shall not be permitted under any circumstances to interfere with privileged communications.
- (3) Electronic eavesdropping shall only be authorized in circumstances analogous to those under which a peace officer has the right to arrest without warrant.
- (4) Evidence obtained through the illegal use of electronic eavesdropping shall not be made admissible in any court of law.
- (5) Any charge before any Court, the investigation of which has in the opinion of the Court, been furthered by means of a wilful disregard of the provisions against electronic eavesdropping shall be dismissed, unless the Court is of the opinion that such a dismissal would not be in the interest of justice."

* * * * *


Ronald C. Merriam,
Secretary.

January 2, 1968.

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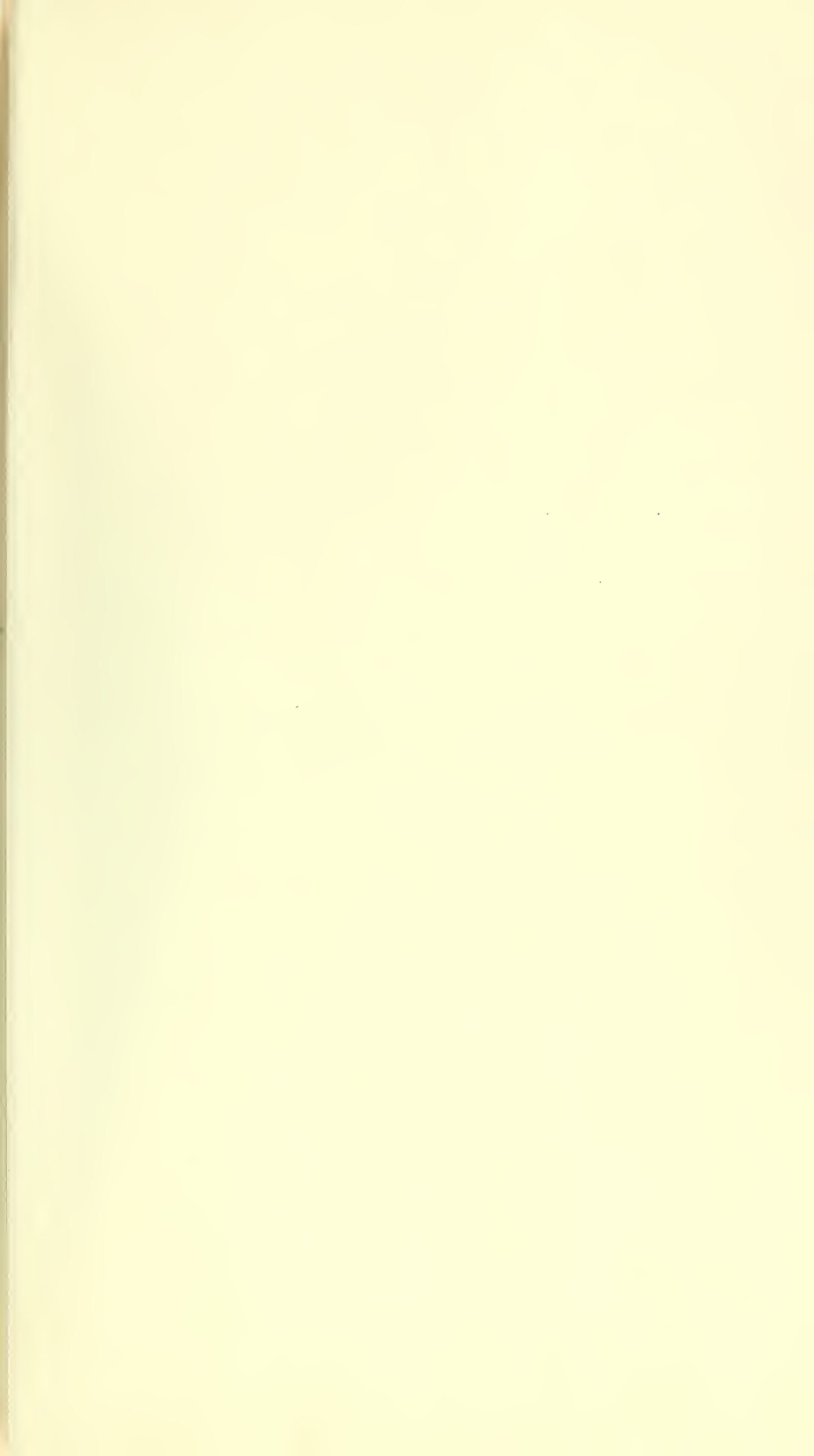
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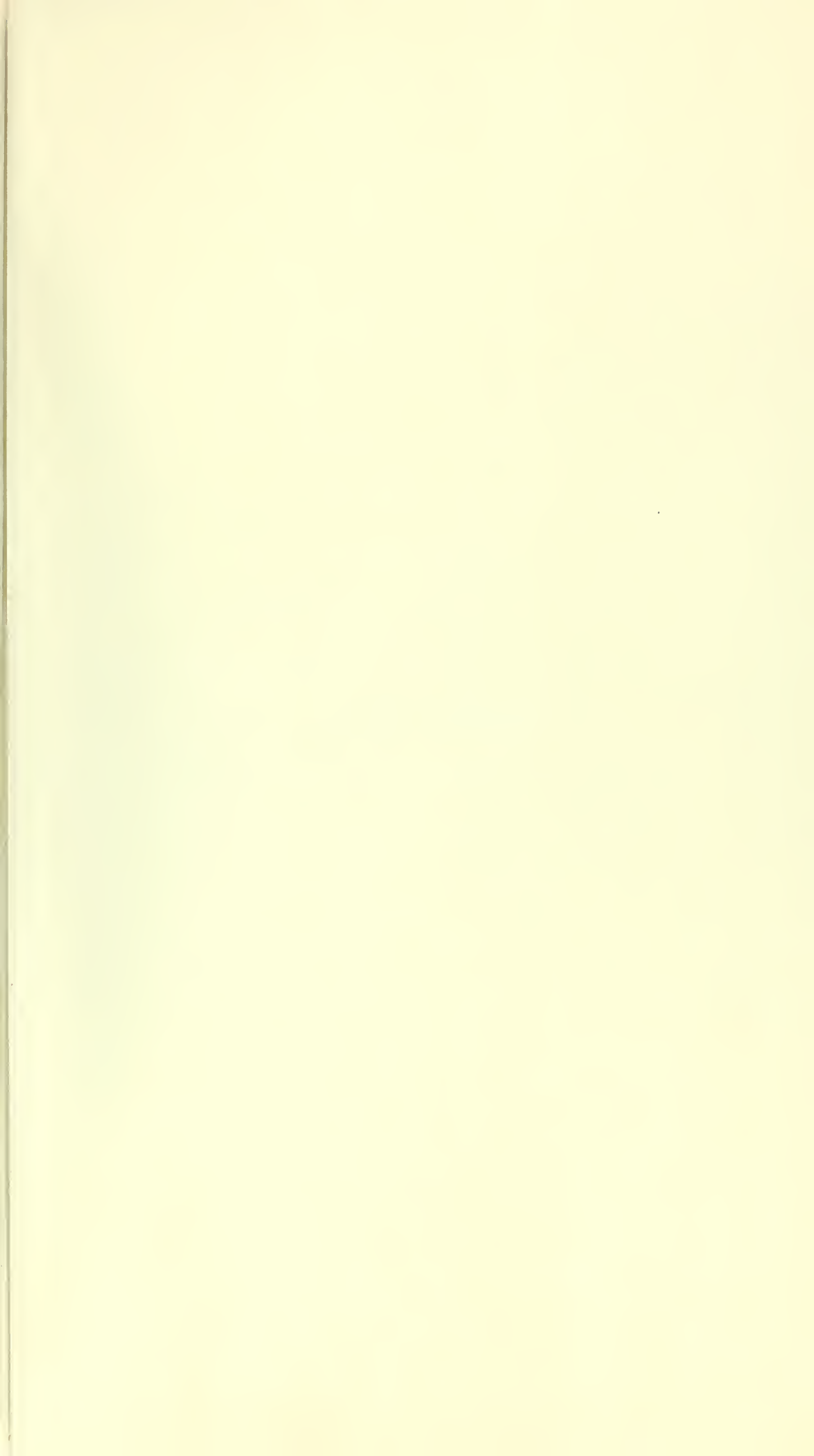
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